

13
No. 95-244-CFX
Status: GRANTED

Title: Charles Quackenbush, California Insurance
Commissioner, et al., Petitioners
v.
Allstate Insurance Company

Docketed:
August 11, 1995

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Rubinstein, Karl L.

Counsel for respondent: Donovan, Donald Francis

Entry	Date	Note	Proceedings and Orders
1	Aug 11 1995	G	Petition for writ of certiorari filed.
3	Sep 11 1995		Brief amicus curiae of Commissioner of Insurance of the State of Missouri filed.
2	Sep 13 1995		DISTRIBUTED. October 6, 1995 (Page 3)
4	Sep 13 1995	X	Brief of respondent Allstate Insurance Company in opposition filed.
5	Sep 19 1995	X	Reply brief of petitioner filed.
7	Oct 10 1995		REDISTRIBUTED. October 13, 1995 (Page 13)
8	Oct 16 1995		Petition GRANTED. *****
9	Nov 27 1995		Joint appendix filed.
10	Nov 27 1995		Brief of petitioners Chuck Quackenbush, et al. filed.
11	Nov 30 1995		Brief amici curiae of Council of State Governments, et al. filed.
12	Nov 30 1995		Brief amici curiae of Massachusetts and Missouri filed.
13	Dec 14 1995		SET FOR ARGUMENT TUESDAY, FEBRUARY 20, 1996. (2ND CASE).
14	Dec 19 1995		CIRCULATED.
16	Dec 20 1995		Order extending time to file brief of respondent on the merits until January 5, 1996.
17	Jan 5 1996	X	Brief amici curiae of Reinsurance Association of America, et al. filed.
18	Jan 5 1996	X	Brief of respondent Allstate Insurance Company filed.
19	Jan 5 1996	X	Brief amici curiae of National Association of Independent Insurers, et al. filed.
20	Jan 11 1996		Record filed.
		*	Original record proceedings United States District Court for the Central District of California (BOX).
21	Jan 17 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
22	Jan 31 1996	X	Reply brief of petitioner filed.
23	Feb 20 1996		ARGUED.

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IN THE
Supreme Court of the United States CLERK
 OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
 THE STATE OF CALIFORNIA, IN HIS CAPACITY AS LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, HOLLAND-AMERICA INSURANCE COMPANY TRUST AND MISSION REINSURANCE CORPORATION TRUST,

Petitioner,
 v.

ALLSTATE INSURANCE COMPANY,
Respondent.

Petition for Writ of Certiorari to the
 United States Court of Appeals
 for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred in holding that a remand order based on abstention is reviewable by appeal under the collateral order doctrine developed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

2. Whether the court below erred in holding that the abstention powers of federal courts are limited to actions in equity, or, alternatively, whether that court erred in limiting the exercise of *Burford* abstention solely to actions in equity.

**PARTIES TO THE PROCEEDINGS
AND RULE 29.1 STATEMENT**

The Appellee in the Ninth Circuit, who is the Petitioner here, is Chuck Quackenbush, the Insurance Commissioner of the State of California (statutory successor to John Garamendi) in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, Enterprise Insurance Company Trust, Holland-America Insurance Company Trust, and Mission Reinsurance Corporation Trust.¹ The Appellant in the Ninth Circuit, and Respondent here, is Allstate Insurance Company.

¹ Prior to receivership, the parent of Mission Insurance Company was Mission Insurance Group, Inc. ("MIG"). MIG emerged from Chapter 11 bankruptcy as Danielson Holding Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	12
I. INTRODUCTION	12
II. AS TO THE REVIEWABILITY OF THE RE- MAND ORDER	13
III. AS TO THE APPROPRIATENESS OF AB- STENTION	16
A. There Is A Conflict Among The Circuit Courts Of Appeals	16
B. The Decision Below Is Inconsistent With Other Decisions Of This Court	19
C. The Reliance Upon <i>NOPSI</i> Is Misplaced	22
D. It Is Inappropriate To Base Abstention Doc- trine On The Dichotomy Between Actions At Law And Equity	23
E. The Decision Below Interferes With Cali- fornia's Statutory Scheme	26
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
<i>20th Century Ins. Co. v. Garamendi</i> , 8 Cal.4th 216, 878 P.2d 566, 32 Cal. Rptr.2d 807 (1994), <i>cert. denied</i> , 115 S. Ct. 1106 (1995)	3
<i>Abraugh v. Gillespie</i> , 203 Cal. App.3d 462, 250 Cal. Rptr. 21 (1988)	24
<i>Allstate Insurance Co. v. Hughes</i> , 174 B.R. 884 (S.D.N.Y. 1994)	5
<i>Anderson v. Great Republic Life Ins. Co.</i> , 41 Cal. App.2d 181, 106 P.2d 75 (1940)	3, 24, 25
<i>Ankenbrandt v. Richards</i> , 504 U.S. 689 (1992)	20
<i>Barnhardt Marine Ins., Inc. v. New Eng. Int'l Sur. of Am., Inc.</i> , 961 F.2d 529 (5th Cir. 1992) ..	10
<i>Blackhawk Heating & Plumbing Co., Inc. v. Geeslin</i> , 530 F.2d 154 (7th Cir. 1976)	10
<i>Brillhart v. Excess Ins. Co.</i> , 316 U.S. 491 (1942) ..	26
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943)	9
<i>Calfarm Ins. Co. v. Deukmejian</i> , 48 Cal.3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989)	7
<i>California State Auto. Ass'n Inter-Insurance Bureau v. Maloney</i> , 341 U.S. 105 (1951)	12, 26
<i>Capitol Indemnity Corp. v. Curiale</i> , 871 F.Supp. 205 (S.D.N.Y. 1994)	19
<i>Carpenter v. Pacific Mutual Life Ins. Co.</i> , 10 Cal. 2d 307, 74 P.2d 761 (1937), <i>aff'd sub nom. Neblett v. Carpenter</i> , 305 U.S. 297 (1938)	3, 4, 24
<i>Charleston Area Med. Ctr. v. Blue Cross and Blue Shield Mut. of Ohio, Inc.</i> , 6 F.3d 243 (4th Cir. 1993)	10
<i>Clay v. Sun Ins. Office Ltd.</i> , 363 U.S. 207 (1960) ..	20
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949)	i, 12, 14
<i>Colorado River Water Conservation District v. United States</i> , 424 U.S. 800 (1976)	9
<i>Corcoran v. Ardra Ins. Co., Ltd.</i> , 842 F.2d 31 (2nd Cir. 1988)	10, 13, 15, 16
<i>Corcoran v. Universal Reinsurance Corp.</i> , 713 F. Supp. 77 (S.D.N.Y. 1989)	19
<i>Crist v. J. Henry Schroder Bank & Trust Co.</i> , 696 F.Supp. 981 (S.D.N.Y. 1988)	19

TABLE OF AUTHORITIES—Continued

	Page
<i>Culbertson v. Cizek</i> , 225 Cal. App.2d 451, 37 Cal. Rptr. 548 (1964)	24
<i>Doughty v. Underwriters at Lloyd's, London</i> , 6 F.3d 856 (1st Cir. 1993)	13, 14, 15, 16
<i>Erie v. Tompkins</i> , 304 U.S. 64 (1938)	24
<i>Fair Assessment in Real Estate Association v. McNary</i> , 454 U.S. 100 (1981)	20
<i>Fragoso v. Lopez</i> , 991 F.2d 878 (1st Cir. 1993)	18
<i>Garamendi v. Executive Life Ins. Co.</i> , 17 Cal. App. 4th 504, 12 Cal. Rptr.2d 578, <i>rev. denied</i> (1993) ..	25
<i>Garamendi v. Mission Ins. Co.</i> , 15 Cal. App.4th 1277, 19 Cal. Rptr.2d 190, <i>rev. denied</i> (1993)....	8
<i>Garris v. Carpenter</i> , 33 Cal. App.2d 649, 92 P.2d 688 (1939)	5
<i>General Glass Industries Corp. v. Monsour Medical Foundation</i> , 973 F.2d 197 (3d Cir. 1992)	18
<i>German Alliance Ins. Co. v. Lewis</i> , 233 U.S. 389 (1914)	26
<i>Gonzalez v. Media Elements, Inc.</i> , 946 F.2d 157 (1st Cir. 1991)	18
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	13, 21
<i>Grimes v. Crown Life Ins. Co.</i> , 857 F.2d 699 (10th Cir. 1988), <i>cert. denied</i> , 489 U.S. 1096 (1989) ..	10
<i>Hartford Cas. Ins. Co. v. Borg-Warner Corp.</i> , 913 F.2d 419 (7th Cir. 1990)	10, 18
<i>Johnson v. Jones</i> , 515 U.S. —, 115 S. Ct. 2151 (1995)	12, 14
<i>Katchen v. Landy</i> , 382 U.S. 323 (1966)	25
<i>Kinder v. Superior Court</i> , 78 Cal. App.3d 574, 144 Cal. Rptr. 291 (1978)	25
<i>Lac D'Amiante du Quebec, Ltee v. American Home Assur. Co.</i> , 864 F.2d 1033 (3rd Cir. 1988)	10
<i>Law Enforcement Ins. Co. v. Corcoran</i> , 807 F.2d 38 (2d Cir. 1986), <i>cert. denied</i> , 481 U.S. 1017 (1987)	10
<i>Levy v. Lewis</i> , 635 F.2d 960 (2nd Cir. 1980)	10
<i>Louisiana Power & Light Co. v. City of Thibodaux</i> , 360 U.S. 25 (1959)	19
<i>Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.</i> , 910 F.2d 249 (5th Cir. 1990)	10

TABLE OF AUTHORITIES—Continued

	Page
<i>Morgan Stanley Mortgage Capital, Inc. v. Insurance Commissioner</i> , 18 F.3d 790 (9th Cir. 1994) ..	26
<i>Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983)	13, 14
<i>New Orleans Public Service, Inc. v. Council of the City of New Orleans</i> , 491 U.S. 350 (1989)	11, 17, 22, 23
<i>Osborn v. Ozlin</i> , 310 U.S. 53 (1940)	12, 26
<i>Penn General Casualty Co. v. Commonwealth of Pennsylvania</i> , 294 U.S. 189 (1935)	10
<i>Pepper v. Litton</i> , 308 U.S. 295 (1939)	25
<i>Property Cas. Ins. v. Central Nat. Ins. Co. of Omaha</i> , 936 F.2d 319 (7th Cir. 1991)	10
<i>Prudential Reinsurance Co. v. Superior Court (Garamendi)</i> , 3 Cal.4th 1118, 842 P.2d 48, 14 Cal. Rptr.2d 749 (1992)	6, 8, 26
<i>Public Affairs Associates, Inc. v. Rickover</i> , 369 U.S. 111 (1962)	24
<i>Ralphs Grocery Co. v. Reimel</i> , 69 Cal.2d 172, 444 P.2d 79, 70 Cal. Rptr. 407 (1968)	7
<i>Riley v. Simmons</i> , 45 F.3d 764 (3rd Cir. 1995)	18
<i>Thermtron Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336 (1976)	12, 13
<i>Todd v. DSN Dealer Service Network, Inc.</i> , 861 F.Supp. 1531 (D. Kan. 1994)	19
<i>Underwriters Nat'l Assurance Co. v. North Carolina Life & Acc. & Health Ins. Guaranty Ass'n</i> , 455 U.S. 691 (1982)	5
<i>United States v. Five Gambling Devices Labelled in Part "Mills," and Bearing Serial Nos. 593-221</i> , 346 U.S. 441 (1953)	13, 21
<i>United States v. Lopez</i> , 514 U.S. —, 115 S. Ct. 1624 (1995)	13, 20, 28
<i>United States Department of Treasury v. Fabe</i> , 508 U.S. —, 113 S. Ct. 2202 (1993)	12, 22, 27, 28
<i>Westerholm v. 20th Century Ins. Co.</i> , 58 Cal. App.3d 628, 130 Cal. Rptr. 164 (1976)	24
<i>Wilton v. Seven Falls, Co.</i> , 515 U.S. —, 115 S. Ct. 2137 (1995)	26
<i>Wolfson v. Mutual Benefit Life Ins. Co.</i> , 51 F.3d 141 (8th Cir. 1995)	16, 17, 18
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	9

TABLE OF AUTHORITIES—Continued

Statutory Provisions	Page
15 U.S.C. §§ 1011-1015	2, 12, 21, 27
28 U.S.C. § 1254 (1)	2
28 U.S.C. § 1332 (a)	2
28 U.S.C. § 1332 (a) (2)	9
28 U.S.C. § 1441 (a)	2
28 U.S.C. § 1441 (c)	2, 9
28 U.S.C. § 1447 (d)	11
Cal. Ins. Code §§ 900-900.2	2, 6
Cal. Ins. Code § 900.9	2, 6
Cal. Ins. Code §§ 903-903.5	2, 6
Cal. Ins. Code §§ 905-911	2, 6
Cal. Ins. Code §§ 922.1-923.5	2, 6
Cal. Ins. Code §§ 922.2-922.8	8
Cal. Ins. Code § 925	2, 6
Cal. Ins. Code § 925.2	2, 6
Cal. Ins. Code § 925.4	2, 6
Cal. Ins. Code §§ 1010-1064.12	2, 3, 8
Cal. Ins. Code § 1011	3, 4
Cal. Ins. Code § 1016	3
Cal. Ins. Code § 1021	4
Cal. Ins. Code §§ 1023-1033	7
Cal. Ins. Code § 1031	10
Cal. Ins. Code § 1032	4
Cal. Ins. Code § 1037	5
Cal. Ins. Code § 1037 (c)	4, 7
Cal. Ins. Code §§ 1056.5-1064.12	2, 3
Cal. Ins. Code § 1057	3
Cal. Ins. Code § 1059	3
Cal. Ins. Code § 1064.2 (b)	3
Other	
Shapiro, David L., <i>Jurisdiction and Discretion</i> , 60 N.Y.U.L. Rev. 543 (1985)	17, 23
Young, Gordon G., <i>Federal Court Abstention and State Administrative Law from Burford to Ankenbrandt: Fifty Years of Judicial Federalism Under Burford v. Sun Oil Co., and Kindred Doctrines</i> , 42 DePaul L. Rev. 859 (1993)	23

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95 - —

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA, IN HIS CAPACITY AS LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, HOLLAND-AMERICA INSURANCE COMPANY TRUST AND MISSION REINSURANCE CORPORATION TRUST,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

**Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 47 F.3d 350. The unpublished order of the district court granting abstention under the *Burford* doc-

trine is reproduced in Appendix B. The unpublished order of the court of appeals denying the petition for rehearing is reproduced in Appendix C.

JURISDICTION

The opinion of the court of appeals was entered on February 2, 1995. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on May 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the pertinent provisions of the McCarran-Ferguson Act, codified at 15 U.S.C. §§ 1011-1015, the pertinent provisions of the California Insurance Code, codified at Cal. Ins. Code §§ 900-900.2, 900.9, 903-903.5, 905-911, 922.1-923.5, 925, 925.2, 925.4, 1010-1042, 1056.5-1064.12, and the pertinent provisions of the Judiciary Act, codified at 28 U.S.C. §§ 1332(a), 1441(a), (c). These are reproduced in Appendix D.

STATEMENT OF THE CASE

1. The present case arose out of the on-going liquidation proceedings relating to the Mission Insurance Companies² which were placed into California state court conservation proceedings on October 31 and November 26, 1985, and into liquidation proceedings on February 24, 1987.³ This was the largest insurance insolvency in U.S. history up to that time and involves policyholders in all 50 states.⁴ As will be discussed in more detail below

² Mission Insurance Company ("MIC"), Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company and Mission Reinsurance Corporation.

³ See *infra*, n.7 & 8.

⁴ MIG, the parent of MIC, and several non-insurance affiliates were placed into federal bankruptcy proceedings. By the wise

at 20-22, 26-28, this case involves unique and important issues of judicial federalism.

2. California, like all states, has enacted a comprehensive statutory scheme for the administration of insurance insolvency matters. Cal. Ins. Code §§ 1010-1064.12. Upon an insolvency, title to all assets of the insolvent, including all accounts receivable, is vested in the California Insurance Commissioner (the "Commissioner")⁵ by operation of law. Cal. Ins. Code §§ 1011, 1064.2(b). The California statutes require that the Commissioner be appointed conservator or liquidator of insolvent insurers, Cal. Ins. Code §§ 1011, 1016, and in that capacity, the Commissioner acts as receiver and trustee. Cal. Ins. Code § 1057; *Anderson v. Great Republic Life Ins. Co.*, 41 Cal. App.2d 181, 188, 106 P.2d 75, 79 (1940). In this role the Commissioner is not simply a common law receiver, but acts in his official capacity as an officer of the state, and is the embodiment of the state's police power in the insurance insolvency context. Cal. Ins. Code §§ 1011, 1059; see, e.g., *20th Century Ins. Co. v. Garamendi*, 8 Cal.4th 216, 240, 878 P.2d 566, 580, 32 Cal. Rptr.2d 807, 821 (1994), *cert. denied*, 115 S. Ct. 1106 (1995); *Carpenter v. Pacific Mutual Life Ins. Co.*, 10 Cal.2d 307, 329, 74 P.2d 761, 774-775 (1937), *aff'd sub nom. Neblett v. Carpenter*, 305 U.S. 297 (1938).

The instant litigation is only one aspect of, but intimately interwoven with, the overall state court liquidation proceedings which are under the control of the Receiver-

exercise of their respective jurisdictions, the bankruptcy court and the state receivership court have completely avoided any jurisdictional conflict.

⁵ There have been four Commissioners in charge of these proceedings: Commissioner Bruce Bunner, Commissioner Roxani Gillespie, Commissioner John Garamendi, and Commissioner Chuck Quackenbush. Unless there is a reason to do so, this brief will not distinguish between the successive Commissioners and will simply refer to the "Commissioner."

ship Court.⁶ On the one hand, the Commissioner must receive and determine the many thousands of claims (including those of Respondent, Allstate Insurance Company ("Allstate")) which have been filed with the Commissioner pursuant to state statutes. Cal. Ins. Code §§ 1021, 1032, 1037(c). On the other hand, the Commissioner must protect, marshal and eventually liquidate the assets of the Mission Companies, title to which is vested in him in his official capacity. See *Carpenter*, 10 Cal.2d at 329, 74 P.2d at 774-775; Cal. Ins. Code § 1011.

3. When the Mission Companies were placed into conservation, the Receivership Court issued orders which both enjoined all persons "from instituting or maintaining any action at law or suit in equity including but not limited to matters in arbitration, against [Mission] or against said Conservator . . . except after an order from this court obtained after reasonable notice to the Conservator" and assumed custody of all assets of the Mission Companies.⁷ Upon liquidation, the Receivership¹ Court again issued orders containing similar injunctions and affirming that court's continuing assertion of jurisdiction over all assets and properties of the Mission Companies, "this court . . . hereby asserts and assumes sole and exclusive jurisdiction over same to the exclusion of all others and further continues to assert and assume sole and exclusive jurisdiction to administer the said assets and property of the [Mission Companies] through the Liquidator, and to determine the validity or invalidity of any and all claims to or affecting such assets."⁸ This Court has held that valid, subsisting

⁶ All references to the "Receivership Court" herein shall mean the Superior Court of the State of California, County of Los Angeles.

⁷ Order Appointing Conservator, October 31, 1985. (App. 116a-118a). The Order included in the Appendix relates to MIC, however, identical Orders were issued on each of the other Mission Companies on November 26, 1985.

⁸ Supplemental Order Regarding Order Appointing Liquidator, March 5, 1987. (App. 122a-126a). The Order Appointing Liquidator

and binding orders of a receivership court are entitled to full faith and credit and comity.⁹

4. As a receiver, the Commissioner must gain control over the process if his statutory mandate is to be carried out. The laws of California vest wide powers in the Commissioner for the purpose of enabling the Commissioner to perform the duties required by statute. See, e.g., Cal. Ins. Code § 1037; *Garris v. Carpenter*, 33 Cal. App. 2d 649, 92 P.2d 688, 692 (1939). Unless the insolvency and all of its claims functions proceed in a single forum it is impossible for the Commissioner to gain such control.

The instant case is an excellent example of this problem. Prior to their receivership, the Mission Companies issued insurance policies to hundreds of thousands of policyholders in all 50 states. These policies represent many billions of dollars in both property and casualty insurance liabilities. For example, policyholder claims include those for workers compensation as well as claims for asbestosis, agent orange, toxic shock syndrome, breast implants, and environmental clean-up matters.

In addition to issuing insurance policies directly to the public, the Mission Companies entered into hundreds of reinsurance transactions with reinsurers from all over the world.¹⁰ By some of these arrangements, various of the

tor dated February 24, 1987, contained in Appendix E, at 119a-121a, relates to MIC, however, identical Liquidation Orders were issued on each of the other Mission Companies on February 24, 1987.

The Conservation Orders, Liquidation Orders and the Supplemental Order are all final and have not been challenged at any level. Allstate may not now complain about provisions of orders of which it had notice and failed to seek review. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Acc. & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 703-710 (1982) [hereinafter *UNAC*]; see *Allstate Insurance Co. v. Hughes*, 174 B.R. 884, 887-888 (S.D.N.Y. 1994).

⁹ *UNAC*, 455 U.S. 691.

¹⁰ Those reinsurers were from countries such as Argentina, Belgium, Bermuda, Brazil, China, Denmark, Egypt, England, Finland,

Mission Companies "ceded" reinsurance to various reinsurers who agreed to accept substantial portions of the risk from the original insurance policies. These reinsurers received hundreds of millions of dollars in premium money for the assumption of this risk. Under still other arrangements, various reinsurers ceded business to one or more of the Mission Companies. As a further complication, many of the reinsurers who assumed reinsurance from one or more of the Mission Companies also purchased additional reinsurance (e.g., stop loss and catastrophe covers) from a variety of other reinsurers. These transactions created massive insurance and reinsurance webs upon which ultimately depended the financial efficacy of the original insurance policies and the solvency of the Mission Companies.¹¹

5. By the time the Commissioner was forced to place the Mission Companies into state court receivership proceedings, many reinsurers had ceased making payments upon the sums due from them (the "reinsurance recoverables"). Indeed, the primary reason for the insolvency was the failure of the reinsurers to pay the reinsurance recoverables. Disputes then arose between the Commissioner and the reinsurers regarding the interpretation of California law and its application to these reinsurance arrangements in the insolvency context. See, e.g., *Prudential Reinsurance Co. v. Superior Court (Garamendi)*, 3 Cal.4th 1118, 842 P.2d 48, 14 Cal. Rptr.2d 749 (1992) [hereinafter *Prudential*].¹²

France, Germany, India, Ireland, Israel, Italy, Japan, Korea, Kuwait, Monte Carlo, the Netherlands, New Zealand, Norway, Singapore, Spain, Sweden, Switzerland, the United States, and Venezuela, among others.

¹¹ Reinsurance recoverables are treated as credits or assets on the insurers' financial statements. There are statutory provisions which govern reinsurance recoverables. Cal. Ins. Code §§ 900-900.2, 900.9, 903-903.5, 905-911, 922.1-923.5, 925, 925.2, 925.4.

¹² Further, a March 8, 1994 Receivership Court decision regarding reinsurance set-off rights and the proper interpretation of the *Pru-*

After liquidation of the Mission Companies was commenced pursuant to state statute and the related orders issued by the Receivership Court, over 180,000 claims were filed in the receivership proceedings by policyholders, third party claimants, and state guaranty associations, as well as general creditors. Allstate and other reinsurers were among these claimants.¹³

The Commissioner took various actions to sort all of this out. The Commissioner sought to marshal assets, analyze claims, determine claims priorities among claimants and generally to administer the proceedings pursuant to the statutory scheme. Cal. Ins. Code §§ 1023-1033, 1037(c). As to the reinsurance web, the Commissioner made public policy decisions and administrative determinations as to how the various impacted statutes would be interpreted by him, as the public official responsible for interpreting the statutes. See *Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 824, 771 P.2d 1247, 1258, 258 Cal. Rptr. 161, 172 (1989) (Commissioner "has broad discretion to adopt rules and regulations to promote the public welfare"); *Ralphs Grocery Co. v. Reimel*, 69 Cal.2d 172, 177, 444 P.2d 79, 83, 70 Cal. Rptr. 407, 411 (1968) ("[T]he construction of a statute by the officials charged with its administration must be given great weight"). Ultimately, the Commissioner sued several hundred reinsurers in the proceedings pending before the Receivership Court seeking a declaratory judgment, an interpretation of the parties' contracts, money judgments

dential decision is now pending before the California Courts of Appeal in *Imperial Casualty and Indemnity Co. v. Insurance Commissioner of the State of California*, Case No. B083725 [hereinafter *ICIC*].

¹³ Allstate's claim filed in the receivership proceedings asserts the same issues it now seeks to assert in the district court. Allstate entered into approximately 15 treaties and numerous facultative certificates with one or more of the Mission Companies and was, in turn, reinsured by MIC under 14 treaties. Allstate filed several claims in the receivership proceedings in 1987.

and other relief as deemed appropriate by the Receivership Court. To date, the Commissioner has recovered approximately \$1.2 Billion from reinsurers. While most of this recovery resulted from settlement agreements, the vast majority of those settlements were consummated only after complex litigation, all of which occurred under the auspices of the Receivership Court.¹⁴ The litigation involves the interpretation of the various interlocking and related reinsurance arrangements and the application of California statutory and case law to them. The arrangements in issue are exceedingly complex and the rights and obligations of the Mission Companies and the reinsurers under these contracts are controlled by California law, and particularly by various provisions of the California Insurance Code. See, e.g., §§ 922.2-922.8, 1010-1037, 1064.2-1064.8.

The litigation that has occurred in the state Receivership Court has resulted in decisions by the California Courts of Appeal and the California Supreme Court.¹⁵ In *Prudential*, the California Supreme Court rendered a 4-3 opinion involving the highly disputed and complex issue of when, under California statutory law, a reinsurer may set off claims against the insolvent from the reinsurance recoverables. The determination was that certain offsets ("group-to-group") are not permitted, but that others ("company-to-company") are permissible. Part of the instant litigation involves the correct application and interpretation of the *Prudential* decision. There are unsettled difficult issues of state law as to the precise definition of "group-to-group" offset claims and "company-to-

¹⁴ *Insurance Commissioner v. Abeille Paix (L')*, et al., Los Angeles Superior Court (LASC) No. C629709; *Insurance Commissioner v. Abeille Paix Reassurances, et al.*, LASC No. C683233; *Insurance Commissioner v. AIB Syndicate, Inc., et al.*, LASC No. BC065715; and *Insurance Commissioner v. Top International*, LASC No. BC066464.

¹⁵ *Prudential; Garamendi v. Mission Ins. Co.*, 15 Cal. App.4th 1277, 19 Cal. Rptr.2d 190, rev. denied (1993); *ICIC* (pending).

company" offset claims. Having dealt with them on a number of occasions, the Receivership Court is extremely familiar with these issues. If an appellate determination of these issues becomes necessary, it should occur in the California state courts because it involves the interpretation of unsettled issues arising from state statutes and opinions of the California Supreme Court.

6. The basic litigation between the Commissioner and the reinsurers began in December 1986, when the Commissioner filed suit against approximately 144 reinsurers.¹⁶ That case (referred to as "Gillespie I") was consolidated with the liquidation proceedings and has been continuously presided over by the Honorable Kurt J. Lewin of the Receivership Court after a brief period during which the case was before the Honorable Ricardo Torres. The instant complaint was filed in June 1990 and alleges causes of action identical to those in Gillespie I. On August 30, 1990, Allstate removed this action to the federal district court based on diversity grounds under 28 U.S.C. §§ 1332(a)(2), 1441(c).¹⁷

7. After removal, the Commissioner moved to remand under the *Younger*,¹⁸ *Colorado River*¹⁹ and *Burford*²⁰ abstention doctrines. The district court granted the motion to abstain based upon *Burford* and the numerous cases applying the *Burford* doctrine in similar situations involving insolvent insurers. In its order granting abstention, the district court reasoned that by exercising jurisdiction over this action, it would be required to determine an

¹⁶ *Insurance Commissioner v. Abeille Paix (L')*, et al., LASC No. C629709. The number of defendants later grew to approximately 300.

¹⁷ Complete diversity was created when settlements resulted in all non-diverse defendants being dropped from the suit.

¹⁸ *Younger v. Harris*, 401 U.S. 37 (1971).

¹⁹ *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

²⁰ *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

important matter of state law and interfere with the California statutory scheme for the regulation of insolvent insurance companies. The district court noted that this case involved the "critical" claims question of whether a reinsurer is entitled to set off amounts allegedly owed to the Mission Companies under the provisions of the state statutes (Cal. Ins. Code § 1031) (App., 71a). After a thorough review of the cases applying the *Burford* doctrine, the district court concluded that:

California has an overriding interest in regulating insurance insolvencies and liquidations in a uniform and orderly manner. If the Court were to adjudicate the Commissioner's reinsurance dispute with Allstate, and specifically the hotly contested set-off issue, then this important state interest could be undermined by inconsistent rulings from the federal and state courts.

(App., 34a). Accordingly, the district court ordered the remand of this case to the Receivership Court.

8. On appeal to the Ninth Circuit, Allstate pressed its position that the circumstances of this controversy remove it from the considerable authority that abstention is warranted in cases of insurance insolvency.²¹ The Commissioner argued that the remand order was not review-

²¹ See, e.g., *Penn General Casualty Co. v. Commonwealth of Pennsylvania*, 294 U.S. 189 (1935); *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2nd Cir. 1988); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 43-44 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987); *Levy v. Lewis*, 635 F.2d 960, 963-964 (2nd Cir. 1980); *Lac D'Amiante du Quebec, Ltee v. American Home Assur. Co.*, 864 F.2d 1033 (3rd Cir. 1988); *Charleston Area Med. Ctr. v. Blue Cross and Blue Shield Mut. of Ohio, Inc.*, 6 F.3d 243, 250 n.5 (4th Cir. 1993); *Barnhardt Marine Ins., Inc. v. New Eng. Int'l Sur. of Am., Inc.*, 961 F.2d 529, 531-32 (5th Cir. 1992); *Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249, 254-55 (5th Cir. 1990); *Property Cas. Ins. v. Central Nat. Ins. Co. of Omaha*, 936 F.2d 319 (7th Cir. 1991); *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990); *Blackhawk Heating & Plumbing Co., Inc. v. Geeslin*, 530 F.2d 154 (7th Cir. 1976); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 707 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989).

able either under 28 U.S.C. § 1447(d) or as a final collateral order and further argued that this matter presents a classic case for abstention.

9. In a narrowly focused opinion, the court of appeals reversed the district court and held that review of the remand order is not barred by 28 U.S.C. § 1447(d); that the remand order based on abstention was a final collateral order that was reviewable on appeal; and that under *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) [hereinafter *NOPSI*], a district court has no power to exercise any discretion to abstain under *Burford* where the suit involves a purely legal action, as opposed to an action in equity. The Ninth Circuit wrote:

The Supreme Court's recent, restrictive reading of *Burford*, together with its reaffirmation of the doctrine's equitable predicate, leads us to conclude that a district court may not abstain under *Burford* when the plaintiff seeks only legal relief.

(App., 12a).

10. On February 16, 1995, the Commissioner filed a petition for rehearing and suggestion for rehearing *en banc* because, *inter alia*, the Ninth Circuit overlooked the fact that the underlying action involves a suit for declaratory relief, which under California law sounds in equity; and that Allstate's set-off claim is an equitable remedy sought under sanction of a state statute; and that the specialized state-court liquidation proceedings are essentially equitable in nature. On May 19, 1995, the Ninth Circuit denied rehearing.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION.

This case merits the attention of this Court because it involves matters of vital and national public concern. First, it involves important issues as to when a district court's order is immediately appealable, thereby raising questions of finality, and of frustration of the administration of justice by delay and by misuse of appellate resources. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 350 (1976); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); see *Johnson v. Jones*, 515 U.S. —, 115 S. Ct. 2151 (1995). Next, it serves to confuse and undermine abstention doctrines, particularly *Burford* abstention, and undermines judicial federalism in general by impeding the power of the states in an important state enclave. Significantly, as discussed further below, the court of appeals' opinion conflicts with opinions of this Court and with opinions of other courts of appeals. This Court has long recognized the extreme importance of preserving the dual system of government and protecting the prerogatives of the states. Both this Court and Congress have recognized the paramount interest of the states in regulating the business of insurance, including the regulation of insurance insolvency proceedings.²² Indeed, it is at the time of a massive insurance failure, such as the one involved here, that the policyholders are most in jeopardy. The entire insurance regulatory system fails if it cannot, at such a moment of crisis, deliver upon the fundamental promises made to the policyholders.

This Court has fostered doctrines of federalism by protecting state authority against federal intrusion in certain

²² *United States Department of Treasury v. Fabe*, 508 U.S. —, 113 S. Ct. 2202 (1993); *Osborn v. Ozlin*, 310 U.S. 53 (1940); *California State Auto. Ass'n Inter-Insurance Bureau v. Maloney*, 341 U.S. 105 (1951); *McCarran-Ferguson Act*, §§ 1011-1015.

extremely important circumstances²³ and this case involves an extremely important circumstance. The Ninth Circuit's formalistic approach—of limiting the applicability of abstention principles on the basis of historical distinctions no longer apt—should not be allowed to stand. It gravely threatens the proper administration of the valuable abstention doctrines developed by this Court.

The opinion of the court below also gravely threatens the administration of insurance insolvencies by the states and, not only erodes principles of federalism, but also frustrates the clear intent of Congress that the business of insurance is to be administered by the states according to state statutes.

II. AS TO THE REVIEWABILITY OF THE REMAND ORDER.

The decision in this case squarely conflicts with decisions of two other courts of appeals on the question of whether a remand order based on *Burford* abstention is reviewable by appeal under the collateral order doctrine established by this Court in *Cohen*. See *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993); *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2nd Cir. 1988). Further, the decision below is in conflict with this Court's opinion in *Thermtron*, 423 U.S. at 352-53, where the Court enunciated the general rule that "because an order remanding a removed action does not represent a final judgment reviewable by appeal, the remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

The decision also conflicts with this Court's opinion in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). In *Cone*, this Court described the

²³ See, e.g., *United States v. Lopez*, 514 U.S. —, 115 S. Ct. 1624 (1995); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *United States v. Five Gambling Devices Labelled in Part "Mills," and Bearing Serial Nos. 593-221*, 346 U.S. 441 (1953).

Cohen collateral order test as follows: "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Cone*, 460 U.S. at 11-12 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Recently, this Court has taken steps to confine the collateral order doctrine to cases in which it is truly apt. See, e.g., *Johnson*, 515 U.S. —, 115 S. Ct. 2151.

The Ninth Circuit's conclusion that the decision to remand in itself satisfies the *Cohen* test is contrary to the decisions in *Doughty* and *Ardra*. In *Doughty*, a state insurance commissioner filed suit in state court to collect reinsurance recoverables, as well as treble damages, from reinsurers of an insolvent insurer. The reinsurers invoked 9 U.S.C. § 205 (1988), removed the suit to federal district court, and sought arbitration and a stay of the proceedings pending the arbitration process. The district court granted a motion to remand made by the Commissioner, concluding that *Burford* abstention principles applied. The reinsurers simultaneously appealed and sought a writ of mandamus of the remand order. The First Circuit determined that the remand order in that case did not pass the *Cohen* test and was not appealable. In contrast to the outcome here, in *Doughty* the First Circuit concluded that the district court's decision to remand did not conclusively determine whether the dispute should be arbitrated, and thus failed to satisfy *Cohen*'s collateral issue requirement. The *Doughty* court stated, "We agree with the Second Circuit that, to come within the collateral order rule, a decree must definitively resolve the merits of the collateral issue, not merely determine which court will thereafter resolve it." 6 F.3d at 863 (citation to *Ardra*, 842 F.2d at 35; *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 970-71 (9th Cir. 1992)). The *Doughty* court further de-

cided that the remand order was not immediately appealable because it failed to satisfy a second element of *Cohen* requiring that the disputed issue represent "an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court's discretion." *Id.* (quoting *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 21 (1st Cir. 1985)). The First Circuit in *Doughty* concluded, "We hold, therefore, that an order to remand premised on *Burford* abstention is not immediately appealable under the *Cohen* rubric." *Id.* at 864.

In *Ardra*, a state insurance commissioner sought recovery of reinsurance proceeds due from a reinsurer to an insolvent insurer. The defendant reinsurers removed the action to federal court in an attempt to compel arbitration pursuant to the *Foreign Arbitral Awards Convention*, Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.A. 38. The district court abstained from exercising jurisdiction and remanded to the state court. The reinsurers appealed the remand order, and the New York Insurance Commissioner moved to dismiss the appeal for lack of appellate jurisdiction. The Second Circuit followed *Thermtron*, holding that the order of remand was not a final judgment and, therefore, not subject to review by appeal. The *Ardra* court determined:

[W]e are compelled to conclude that *Ardra*'s appeal from the remand order must be dismissed, for *Thermtron* makes clear that the proper vehicle for review of a remand order is mandamus, and not appeal: "[B]ecause an order remanding a removed action does not represent a final judgment reviewable by appeal, '[t]he remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done.'"

842 F.2d at 34 (quoting *Thermtron*, 42 U.S. at 352, 53 (quoting *Railroad Co. v. Wiswall*, 90 U.S. 507, 508 (1875))). This outcome by the Second Circuit is in direct conflict with the Ninth Circuit's decision.

In contrast to *Doughty* and *Ardra*, the Ninth Circuit concluded that the remand order was appealable because the decision on abstention constitutes the collateral issue, seemingly rejecting the notion that there must be a separately decided issue of law, such as arbitrability. (App., 6a-7a). Further, in direct conflict with *Doughty*, the court below failed to segregate what is appropriately considered a separate collateral issue and concluded that "determinations of whether a federal or state court should adjudicate the merits of a case constitute separate decisions apart from the merits for the purposes of the final collateral order test." (App., 7a). Accordingly, this decision by the Ninth Circuit squarely conflicts with decisions of both the First and Second Circuits. For these reasons, and because the question vitally affects the proper relation between trial and appellate courts, the issue of whether a remand order based on *Burford* abstention is reviewable on appeal is ripe for review by this Court.

III. AS TO THE APPROPRIATENESS OF ABSTENTION.

A. There Is A Conflict Among The Circuit Courts Of Appeals.

The decision below is in direct conflict with several courts of appeals on a matter critical to issues of comity and federalism. Because there is substantial confusion on the issue of whether, post-*NOPSI*, a federal court has the power to abstain in a case such as this one, the issue is ripe for decision by this Court.

The most glaring conflict arises from the recent decision of the Eighth Circuit in *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995). In *Wolfson*, the Eighth Circuit expressly rejected the Ninth Circuit's equity-law distinction in the instant case, holding that *Burford* abstention was appropriate in an insurance insolvency matter regardless of whether "equitable" or "legal" relief was sought. The Eighth Circuit stated,

Some courts have concluded that *Burford* abstention is only available for claims seeking equitable relief because the Supreme Court has noted the discretionary nature of equitable relief as a factor justifying *Burford* abstention. We think it unwise to make rigid distinctions between legal and equitable claims in the merged federal system, particularly for claims such as those under ERISA whose historical antecedents are unclear.

Id. at 147 (citation to David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 551-52 (1985)). In *Wolfson*, a beneficiary under a life insurance policy issued by Mutual Benefit Life Insurance Company ("MBL") appealed a series of orders staying her federally-filed action to recover life insurance benefits under an ERISA plan. The district court had stayed plaintiff's action pending further order of the New Jersey state receivership court because while plaintiff's lawsuit was pending, MBL was placed into rehabilitation and the New Jersey Commissioner of Insurance was appointed Rehabilitator. Like the Receivership Court here, the New Jersey court enjoined further prosecution of "any action at law, suit in equity, special or other proceeding against [MBL]." *Id.* at 143. The Eighth Circuit held that the district court's decision to abstain and stay was not an abuse of discretion because MBL was placed in state court insolvency proceedings.

Since the state insolvency scheme provided for the resolution of plaintiff's claim, the *Wolfson* court determined that *Burford* and *Colorado River* abstention were appropriate. Citing *NOPSI*, the court in *Wolfson* stated: "the various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases." *Id.* at 145. "In our view, the Supreme Court's abstention decisions are best viewed as delineating the considerations of federalism, comity, and judicial administration that may justify overriding the strong presumption in favor of exercising federal jurisdiction, not as setting out dis-

crete mechanical tests." *Id.* The reasoning and result in *Wolfson* squarely conflict with the Ninth Circuit's decision below.

There are several other recent circuit court decisions that also conflict with the decision below. In *General Glass Industries Corp. v. Monsour Medical Foundation*, 973 F.2d 197 (3rd Cir. 1992), an insurance insolvency case, the Third Circuit court held that, "Where the district court's exercise of jurisdiction would interfere with ongoing proceedings pursuant to a state regulatory scheme, such as a regulatory scheme concerning the insurance industry, the district court, under a *Burford* analysis, may abstain." *Id.* at 201. The Third Circuit noted that, "Decisional authority remains inconclusive as to whether *Burford* abstention may be ordered *only* in cases of an equitable nature" *Id.* at 202. In *Riley v. Simmons*, 45 F.3d 764 (3rd Cir. 1995), also an insurance insolvency case, the Third Circuit ruled that abstention was inappropriate because the plaintiff could not receive timely or adequate state court review of its federal claims, but the opinion contains a discussion of the law-equity issue which demonstrates the existing confusion. *Id.* at 772-773, n.7.²⁴

There are other decisions which appear to be in conflict. See *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991) (court held *Burford* abstention appropriate in money damages case without mention of equity/law distinction); *Hartford*, 913 F.2d 419 (justifying *Burford* abstention without reference to equity/law issue; abstention justified where maintenance of action could result in plaintiff jumping ahead of other creditors

²⁴ See also the First Circuit's decision in *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993). In *Fragoso*, the First Circuit refused to abstain on the *Burford* doctrine when the only equitable power the court is asked to exercise is the act of abstention itself.

in specialized claims proceeding and where determination of liability would require federal court to litigate same issues being decided in specialized claims proceeding).²⁵

The foregoing cases demonstrate the need for this Court's guidance in this confused area and also show that the impact upon the important field of insurance insolvency is not limited to the instant case, but is sure to recur.

B. The Decision Below Is Inconsistent With Other Decisions Of This Court.

The decision of the court of appeals that the very power to abstain does not exist unless the underlying action is in equity conflicts with other decisions of this Court. A reading of this Court's body of decisions relating to abstention demonstrates that the power to abstain arises, not out of mere form, but because of a deeper and overriding policy grounded in principles of judicial federalism, comity, and the need to avoid unnecessary friction between the state and federal systems, particularly where complex issues involving the vital public interests of the states are involved. This Court approved abstention in an action at law in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) ("These prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect

²⁵ While not dispositive, there are a number of recent district court opinions conflicting with the decision below, the existence of which serves to demonstrate the extent of disagreement in the federal judicial decisions and the need for this Court to resolve the conflict. See, e.g., *Capitol Indemnity Corp. v. Curiale*, 871 F.Supp. 205 (S.D.N.Y. 1994); *Todd v. DSN Dealer Service Network, Inc.*, 861 F.Supp. 1531, 1539-41 (D. Kan. 1994); *Corcoran v. Universal Reinsurance Corp.*, 713 F.Supp. 77 (S.D.N.Y. 1989); *Crist v. J. Henry Schroder Bank & Trust Co.*, 696 F.Supp. 981 (S.D.N.Y. 1988) (court dismissed, on *Burford* abstention, counterclaim on reinsurance contract dispute against insolvent insurer's receiver in action brought by receiver regarding right to draw on letters of credit).

a deeper policy derived from our federalism.”). See also *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (this Court confirmed a “domestic relations exception” to federal court jurisdiction as to divorce and alimony decrees and child custody orders, and declined to apply *Colorado River* or *Burford* abstention, but stated “It is not inconceivable, however, that in certain circumstances, the abstention principles developed in [*Burford*] might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody. This would be so when a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.”); *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 (1981) (this Court applied basic principles of comity and federalism in a suit brought under 42 U.S.C. § 1983); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960) (this Court certified a question to a state court in a legal action). While none of these cases squarely involved *Burford* abstention, their rationales were very closely related. Indeed, the principles of abstention cannot be separated into watertight compartments.

As recently as in *United States v. Lopez*, 514 U.S. —, 115 S. Ct. 1624 (1995), this Court focused upon the extreme importance of maintaining a balance of power between the federal government and the states: “Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”²⁶ Justice Kennedy’s concurring opinion, with Justice O’Connor joining, notes that absten-

²⁶ 514 U.S. at —, 115 S. Ct. at 1626 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458).

tion doctrines are important in maintaining this balance.²⁷ Recent decisions of this Court show great concern over maintaining the dual system of government and the preservation of the prerogatives of the states. In *Five Gambling Devices*, 346 U.S. 441, this Court refused to read into a congressional enactment an intent that the federal government should be able to interfere in an area traditionally within the control of the states. There, this Court affirmed several district court dismissals of indictments charging defendants with engaging in the business of dealing in gambling devices, rejecting the Government’s attempt to interpret expansively congressional intent to raise constitutional issues under the commerce power in a field of state and local concern.

In *Gregory*, 501 U.S. 452, this Court refused to interfere with certain mandatory retirement provisions of Missouri state law, recognizing the importance of the federalist structure of joint sovereigns together with the “constitutionally mandated balance of power” between the state and federal governments.

Under the rationale of these decisions, and the many similar ones, one cannot doubt that this Court intends to preserve and protect basic federalism principles and defend the prerogatives of state government. By relying *solely* on the law-equity distinction as its litmus test, the Ninth Circuit opinion in question is out-of-step with these very important precepts as they must be applied to the regulation of insurance by the State of California.

In the instant case, the intent of Congress is not in doubt. With McCarran-Ferguson, *supra*, the Congress expressed its intent that the power to regulate the business

²⁷ Although in *Lopez* this Court was divided as to the scope of the commerce clause, that issue is not present in the instant case, particularly because Congress has itself determined that the business of insurance should be left in the hands of the states. McCarran-Ferguson Act, 15 U.S.C. § 1011-15.

of insurance be left to the police power of the states. In order to make this concept meaningful, this Court decided in *Fabe* that the "business of insurance" included state court insolvency proceedings. After *Fabe*, it should be clear that the view of this Court and the view of the Congress are completely in accord because both have determined that the regulation of insurance shall be a state function.

To fully and sensitively give effect to congressional intent, and to maintain the federalism principles clearly enunciated by this Court, the Court should protect the ability of the district courts to abstain after making studied judgments as to when a given case should proceed in a single state forum in order to carry out the state statutory mandates.

C. The Reliance Upon *NOPSI* Is Misplaced.

Although the court of appeals states that Allstate's appeal was based upon the argument that the district court did not have the power to abstain because of *NOPSI* (App., 8a), the briefs filed by Allstate show that it did not actually urge this ground. Allstate only argued that under *NOPSI*, the nature of the underlying action was a factor to be considered, among others.²⁸ Thus, the Ninth Circuit decision attributes too much to Allstate and grants a position not urged. This point aside, the Ninth Circuit also attributes too much to this Court's *dicta* in *NOPSI*.

Although in *NOPSI* this Court considered equitable principles in determining whether to grant or deny abstention, it did not lay down a "bright line" rule that abstention may be proper *only* in cases involving underlying actions in equity, and further, did not hold that

²⁸ See Opening Brief of Defendant-Appellant Allstate Insurance Company, dated Nov. 4, 1991, at 28-34; Reply Brief of Appellant, dated Mar. 9, 1992, at 14. (Appendix F, 127a-132a).

abstention is improper when the underlying action is at law. The Commissioner has never argued that the nature of the underlying action should not be considered by the district court in making its decision as to abstention. The Commissioner simply argued that the nature of this underlying action strongly militates in favor of abstention. The district court agreed.

Unfortunately, there is no doubt that *NOPSI* has generated a great deal of discussion and controversy.²⁹ The instant case provides this Court with an excellent opportunity to clarify whether it intended to establish the hard and fast rule that federal courts may never abstain in actions at law. Indeed, the Ninth Circuit opinion itself, very narrowly focused as it is, seems to reach out for such clarification. The conflicting opinions cited above demonstrate that the mere existence of the current confusion among the courts and the debate over this issue interferes with the smooth and efficient operation of the federal courts and state court insurance insolvency proceedings as well. Instead of focusing upon the job mandated by the state statutory scheme, the Commissioner may be forced to defend basic provisions of that system in the federal courts. The situation, therefore, urgently needs clarification by this Court.

D. It Is Inappropriate To Base Abstention Doctrine On The Dichotomy Between Actions At Law And Equity.

The continuation of the ancient dichotomy between actions at law and actions in equity is subject to criticism, see, e.g., David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 551-553 (1985), and this case serves to show the difficulties that such a rule would

²⁹ Gordon G. Young, *Federal Court Abstention and State Administrative Law from Burford to Ankenbrandt: Fifty Years of Judicial Federalism Under Burford v. Sun Oil Co. and Kindred Doctrines*, 42 DePaul L. Rev. 859 (1993).

present. This is particularly true where most state courts and all federal district courts operate under a procedure in which law and equity have merged.

Maintenance of the dichotomy between law and equity is particularly difficult in cases such as this case, which involves special proceedings in state court and in which the underlying litigation has multiple causes of action, some sounding in law and others in equity. For example, the record clearly reveals that this case involves an action for declaratory relief,³⁰ a set-off defense, and special (equitable) liquidation proceedings. The case also involves claims for money damages. These circumstances raise numerous difficulties with any attempt to characterize precisely the case as purely an action at law or an action in equity. Sophisticated modern business transactions create multifaceted disputes which result in multi-count lawsuits. Very frequently suits will involve actions at law, actions in equity, actions for declaratory judgment and actions under federal or state statutes. If this Court mandates that abstention may occur in actions in equity, but not as to actions at law, then suits which contain special statutory causes of action or various combinations of legal and equitable actions will be left outside the scope of the abstention doctrine. The instant case is particularly vulnerable to this confusion because state insurance insolvency proceedings are "special proceedings," and are not the typical adversarial litigation. *Carpenter*, 10 Cal.2d at 327, 74 P.2d at 773; *Abraugh v. Gillespie*, 203 Cal. App.3d 462, 468, 250 Cal. Rptr. 21, 24-25 (1988); *Anderson*, 41 Cal. App. 2d at 188-189, 106

³⁰ In matters of state law, state law governs the decisions of federal courts. *Erie v. Tompkins*, 304 U.S. 64 (1938). California courts have recognized that "An action for declaratory relief is equitable." *Westerholm v. 20th Century Ins. Co.*, 58 Cal. App.3d 628, 632, 130 Cal. Rptr 164, 166 n.1 (1976); *Culbertson v. Cizek*, 225 Cal. App.2d 451, 462, 37 Cal. Rptr. 548, 553 (1964). Federal courts reach a similar result. See, e.g., *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962).

P.2d at 79. The action by an insurance commissioner such as the underlying litigation between Allstate and the Commissioner is not a mere collection action at law.

The Ninth Circuit seems to view the maintenance of the law-equity distinction as necessary to justify federal court abstention at all. A reading of the opinion of the court below and the authorities it relies upon reflects that, in an action "at law," the Ninth Circuit adopts the rigid premise that a federal court must exercise its jurisdiction and has no alternative but to do so. (App., 8a-12a). The long-standing abstention doctrines, however, demonstrate that there is not and cannot be such a rigid rule. To permit abstention only when the underlying cause of action would have been one in equity in an earlier era would be wholly inappropriate, both as a practical matter and as a matter of sound policy.

The better view is to consider abstention, in proper circumstances, as an exercise of the court's legitimate and principled discretion—a discretion that transcends historical distinctions between law and equity.

The instant case brings these issues to focus. Where an insurance receiver seeks a declaration of the rights and interests of the parties under the reinsurance agreements, this action serves not only to permit the determination of rights and duties between Allstate and the Mission Companies under sophisticated reinsurance arrangements, but also to protect the rights and interests of innocent policyholders of the Mission Companies in the underlying state court insolvency proceedings, which, like bankruptcy proceedings, are inherently equitable in nature. *Katchen v. Landy*, 382 U.S. 323, 336-337 (1966); *Pepper v. Litton*, 308 U.S. 295, 304 (1939); *Garamendi v. Executive Life Ins. Co.*, 17 Cal. App.4th 504, 516, 21 Cal. Rptr.2d 578, 586, rev. denied (1993); *Kinder v. Superior Court*, 78 Cal. App.3d 574, 144 Cal. Rptr. 291, 296 (1978); *Anderson*, 41 Cal. App.2d at 188, 106 P.2d at

79; see also *Morgan Stanley Mortgage Capital, Inc. v. Insurance Commissioner*, 18 F.3d 790, 794 (9th Cir. 1994).

Moreover, Allstate's primary defense of set-off is, in and of itself, a prayer for equitable relief, see *Prudential*, 3 Cal.4th at 1124, 842 P.2d at 50-51, 14 Cal. Rptr.2d at 751-752, and, thus, it will be determined under state law as a part of the declaratory relief action in the Receivership Court. While not squarely on point, this Court's decision in *Wilton v. Seven Falls, Co.*, 515 U.S. —, 115 S. Ct. 2137 (1995),³¹ highlights the importance of this issue because the Court refused to apply a rule that would force federal courts blindly to assume jurisdiction over declaratory judgment actions absent exceptional circumstances. The instant case not only involves a declaratory judgment action and a pending court proceeding as was the situation in *Wilton*, but it even has exceptional circumstances.

Thus, the very nature of this case, as part of a complex, multi-party controversy arising under an elaborate system of state regulation, makes it an ideal vehicle for determining whether the ability to abstain should turn solely on whether a particular suit is one in "law" or "equity."

E. The Decision Below Interferes With California's Statutory Scheme.

This case presents questions of national importance involving comity and federalism requiring deference to California's complex and specialized administrative framework for insurance company insolvencies. This Court has long recognized that the business of insurance is affected with the vital public interest and its regulation is within the police power of the states. *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914); *Osborn*, 310 U.S. 53; *Maloney*, 341 U.S. 105. Congress has manifested its in-

³¹ See also *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942).

tent that the regulation of the business of insurance be left to the states. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. This Court recognized this congressional intent in *Fabe*, 508 U.S. —, where this Court confirmed that a state statute governing the priority of claims against an insolvent insurer is a law enacted for the purpose of regulating the business of insurance and that such state statutes must be given preference over the federal priority statute. In *Fabe*, this Court established a strong deference to state statutes (which protect policyholders) in insurance liquidations, thereby giving effect to the McCarran-Ferguson Act and the public policy considerations behind it.

The instant case presents issues which are no less critical to the systematic conduct of state court insolvency proceedings because the decision below elevates form over substance creating a rigid rule forbidding federal court abstention in insurance insolvency cases where the underlying action is deemed purely an action at law.³² This rule would insert the equity-law distinction into the state statutory scheme and would be a classic disruption of federalism. The Ninth Circuit rule would create an anomalous situation where an entity could file a claim in the receivership proceedings pursuant to the state statutory scheme, but could also assert the right to remove the matter to a federal court. Allstate is not the only reinsurer to claim the right to set off in the liquidation proceedings, nor is it the only reinsurer to allege the equitable defense of set-off in litigation filed by the Commissioner to recover reinsurance recoverables. The result of approving the Ninth Circuit rule, at least as interpreted by Allstate, would be to permit multiple removals of claims to multiple federal courts.

Such a result is particularly inappropriate in this case where the Receivership Court has *in personam* jurisdic-

³² The Commissioner asserts that it is incorrect to hold the underlying litigation as purely an action at law in any event.

tion over both the Commissioner and Allstate³³ and the key issues are presented by claims filed in the receivership proceedings by Allstate in accordance with the California claims statutes. It makes no sense to permit an unnecessary and unsuitable equity-law distinction to control the modern realities of the insurance business and applicable insurance receivership law and thereby undermine the principles established in cases such as *Fabe* and *Lopez*. In the context of an insurance insolvency such distinctions are not a productive use of judicial resources nor an efficient use of the available assets of an already insolvent insurance company whose innocent policyholders have been damaged and who already face substantial delays in the payment of their claims.

³³ Part of Allstate's claim in the MIC liquidation proceedings was for money damages. It also alleged the equitable right to set off. As discussed above, Allstate maintains, among other things, that it may set off whatever amounts it owes MIC against amounts MIC may owe to Allstate. Allstate also raised this set-off defense in the instant lawsuit filed by the Commissioner to collect reinsurance proceeds from Allstate. Thus, Allstate has already subjected itself to the jurisdiction of the Receivership Court on the same issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55855

D.C. No. CV-90-4713-WMB

JOHN GARAMENDI, Insurance Commissioner of the State of California, in his capacity as Liquidator of MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY AND MISSION REINSURANCE CORPORATION, as successor to ROXANI GILLESPIE, Insurance Commissioner of the State of California, in her capacity as Liquidator of MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY AND MISSION REINSURANCE CORPORATION,

Plaintiff-Appellee,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant,

and

INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

Appeal from the United States District Court
for the Central District of California
Wm. Matthew Byrne, Jr., District Judge, Presiding

Argued and Submitted
November 5, 1993—Pasadena, California

Filed February 2, 1995

Before: Betty B. Fletcher, Harry Pregerson,
and William A. Norris, Circuit Judges.

Opinion by Judge Norris

OPINION

NORRIS, Circuit Judge:

This case presents two questions: First, whether a remand order based on abstention is reviewable, and, if so, whether it can be reviewed on appeal, or only by a petition for a writ of mandamus. Second, and more importantly, we consider whether the *Burford* abstention doctrine allows a federal court to surrender jurisdiction to a state court in a case in which no equitable relief is sought.

The district court remanded this case to state court under the *Burford* abstention doctrine. Allstate filed a notice of appeal, which it requested be considered as a petition for a writ of mandamus if review by appeal was not available. Treating this action as an appeal, we reverse because abstention was inappropriate.

I

John Garamendi is the Insurance Commissioner (the "Commissioner") of the State of California and the statutorily designated trustee for insolvent insurance companies.¹ This case arises out of the Commissioner's efforts to liquidate the Mission Group of Insurance companies and recover reinsurance proceeds from several reinsurers, including Allstate Insurance Company ("Allstate").

¹ John R. Garamendi succeeded Roxani Gillespie on January 6, 1991 as Insurance Commissioner of the State of California.

Between 1962 and 1985, Allstate and the Mission Insurance Group² entered into numerous reinsurance agreements, pursuant to which each company reinsured the primary insurance obligations of the other. On October 31, 1985, the Commissioner filed an application in Los Angeles County Superior Court ("the Liquidation Court") requesting the appointment of a conservator for the company.³ The Liquidation Court first ordered the Mission Insurance Group into conservatorship, and then, upon determining that it could not be rehabilitated, ordered that it be liquidated. In August, 1990, the Liquidation Court appointed the Commissioner as liquidator. Pursuant to the California Insurance Code, the Commissioner filed suit on December 22, 1986 against approximately 300 reinsurers of the Mission Insurance Group seeking to recover money due the Mission Insurance Group under various reinsurance agreements. That case was filed in Los Angeles Superior Court ("*Gillespie I*") and subsequently consolidated with the liquidation proceedings.

In June, 1990, the Commissioner filed this action against Allstate and other insurance companies, alleging the same causes of action alleged in *Gillespie I*.⁴ On August 2, 1990, Allstate sought removal of the action on diversity grounds to federal district court under 28 U.S.C. § 1441(c). Once in district court, Allstate moved to compel arbitration, pursuant to an arbitration clause in

² The Mission Insurance Group consists of the following companies: Mission Insurance Company and its subsidiaries Mission National Insurance Company and Enterprise Insurance Company; Mission Reinsurance Corporation; and Holland-America Insurance Company.

³ The procedures followed by the Commissioner are set forth in Cal. Ins. Code § 1010 *et seq.*

⁴ The causes of action included: declaratory relief; suit on contract, conspiracy to breach and to commit tortious breach and tortious breach of the implied covenant of good faith and fair dealing; and conspiracy to commit tort and tortious denial of the existence of contracts.

the reinsurance agreement. Before entertaining the motion, the court heard the Commissioner's motion to remand the action to the state court, which it granted on July 1, 1991.

The district court pointed out that a critical issue in this case is the viability of Allstate's defense that it is entitled to a set-off for the amounts it claims Mission owes it from other reinsurance agreements.⁵ Noting that Liquidation Court Judge Kurt Lewin had developed an "intimate familiarity" with the law in this area by presiding over *Gillespie I*, the district court accepted the Commissioner's argument that *Burford* abstention required it to remand the case to state court because exercising jurisdiction would interfere with a comprehensive state regulatory scheme. Allstate timely appealed to this court.

II

The Commissioner argues that the district court's abstention order is unreviewable, either by appeal or a writ of mandamus, citing 28 U.S.C. § 1447(d), which states "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with a single exception, not applicable to this case. This provision, however, applies only to cases remanded pursuant to § 1447(c), when there is a "defect in removal procedure" or "the district court lack[ed] subject matter jurisdiction." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52 (1976); see also *Price v. PSA, Inc.*, 829 F.2d 871, 874 (9th Cir. 1987), cert. denied, 486 U.S. 1006 (1988) (noting that if an order of remand is "not a mandatory remand under § 1447(c), it enjoys no immunity from review"). Here,

⁵ Obtaining a set-off is crucial to Allstate because it would entitle Allstate to deduct the money the Mission Group owes Allstate under the reinsurance contracts from the money it owes the Mission Group. If Allstate is not entitled to a set-off, it will have to pay Mission and then try to collect what Mission owes it as one of many creditors in the liquidation proceedings.

the district court explicitly based its remand order on a decision to exercise its discretion to abstain from a case that might interfere with a state administrative proceeding, rather than on any ground specified in § 1447(c). Therefore, review of the remand order in this case is not barred by § 1447(d). The question, then, is whether it is appealable, or reviewable only by a writ of mandamus.⁶

In *Thermtron Products*, the Supreme Court stated that "because an order remanding a removed action does not represent a final judgment reviewable by appeal, the remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done." 423 U.S. at 352-53 (emphasis added). The Supreme Court subsequently noted, however, that some orders declining to exercise jurisdiction may be appealable under a narrow exception to the final judgment rule. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11-13 (1983). Describing the exception to finality rule as established in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), the Court held that an abstention order may be appealable as a final collateral order if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the actions, and [is] effectively unreviewable on appeal from a final judgement." *Id.* at 11-12 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The Court held that an order staying a federal action pursuant to abstention under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) qualifies as an appealable final col-

⁶ The method of review will determine the standard of review. Mandamus is available only when there has been a usurpation of judicial power or a clear abuse of discretion below. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). On appeal, we review the applicability of an abstention doctrine de novo and the decision to abstain for abuse of discretion. See *Privitera v. California Bd. of Medical Quality Assurance*, 926 F.2d 890, 895 (9th Cir. 1991).

lateral order. *Cone*, 460 U.S. at 11-13. The question, then, is whether a remand order may also be appealable as a final collateral order when a district court declines to exercise jurisdiction pursuant to one of the doctrines of abstention.

In the wake of *Moses H. Cone*, we held that a remand order, like a stay, may be appealable as a final collateral order under *Cohen*, *Pelleport Investors v. Budco Quality Theaters*, 741 F.2d 273, 278 (9th Cir. 1984). Thus, despite the general rule in *Thermtron*, a remand order may be appealed as a final collateral order if it is "based on a substantive determination on the merits apart from any jurisdictional." *Lee v. City of Beaumont*, 12 F.3d 933 (9th Cir. 1993) (quoting *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1180 (9th Cir. 1989); see also *Executive Software v. United States Dist. Ct.*, 24 F.3d 1545 (9th Cir. 1994). Applying the *Cohen* test to the order in this case, we conclude that a remand order based on abstention is a final collateral order that is reviewable on appeal.

The order in this case satisfies each of the three criteria of the final collateral order test. First, the order conclusively determines a disputed question: whether the facts of the case warrant abstention under *Burford v. Sun Oil*, 319 U.S. 315 (1943). See *Moses H. Cone*, 460 U.S. at 12-13 (concluding that stay based on abstention conclusively determines the applicability of the relevant abstention doctrine).

There can be no dispute that the decision also satisfies the second criterion of the final collateral order test. In *Moses H. Cone*, the Supreme Court held that an "order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits." 460 U.S. at 12. This holding was based on the understanding that the "completely separate from the merits" requirement is merely "a distillation of the principle that

there should not be piecemeal review of 'steps towards final judgment in which they will merge.'" *Id.* at 12 n.13 (quoting *Cohen*, 337 U.S. at 546). In this case, as in *Moses H. Cone*, "there is no step towards final judgment, but a refusal to proceed at all." *Id.* Moreover, in several cases we have concluded that determinations of whether a federal or state court should adjudicate the merits of a case constitute separate decisions apart from the merits for the purposes of the final collateral order test. See *Pelleport*, 741 F.2d at 278; *Clorox v. United States District Court*, 779 F.2d 517, 519-20 (9th Cir. 1985).⁷

Finally, a remand based on abstention would be effectively unreviewable on appeal after a determination of the merits "because it puts the parties out of federal court." *Pelleport*, 741 F.2d at 278. Moreover, a federal court's decision to abstain would be "unreviewable if not appealed now" because the federal court would be bound to honor the state court's determination on the merits as *res judicata*. See *Moses H. Cone*, 460 U.S. at 12.

Because the district court's order of remand in this case qualifies as a final collateral order, we will treat

⁷ We have held on several other occasions that a district court's decision to remand pendent state claims after the attached federal claims have dropped from the case may be reviewed only by mandamus. See *Executive Software v. United States Dist. Ct.*, 24 F.3d (9th Cir. 1994); *Lee v. City of Beaumont*, 12 F.3d 933, 936 (9th Cir. 1993); *Price v. PSA, Inc.*, 829 F.2d 871, 874 (9th Cir. 1987); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 865-66 (9th Cir. 1987); *Survival Systems v. U.S.D.C.*, 825 F.2d 1416, 1418 (9th Cir. 1987). We explained that in such cases the final collateral order doctrine does not apply because the decision to decline to hear pendent state law claims was wholly discretionary and, therefore, not a substantive decision. However, as noted above, the Supreme Court has held that the decision to decline jurisdiction under one of the established doctrines of abstention is a substantive determination apart from the merits for purposes of applying the final collateral order doctrine. To the extent there is a tension between these two lines of decision, we must follow the clear holdings of the Supreme Court.

Allstate's request for review as an appeal. There is no discretion to abstain in a case that does not meet the requirements of the abstention doctrine being invoked. *Privitera v. California Board of Medical Quality Assurance*, 926 F.2d 890, 895 (9th Cir. 1991). We review whether those requirements are met de novo. *Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991); *Privitera*, 926 F.2d at 895. When those requirements are met, the district court's decision whether or not to abstain is reviewed for an abuse of discretion. *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 360 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1052 (1994).

III

Relying on the abstention doctrine articulated in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the district court abstained from hearing this case. Appellant argues that the court abstained inappropriately because *Burford* abstention does not apply to suits seeking solely legal relief.⁸ We agree.

Under 28 U.S.C. § 1332, the District Court in this case clearly had jurisdiction.⁹ It is undisputed that "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989) [hereinafter "*NOPSI*"]. The threshold question, then, is under what conditions, if any, Congress intended to permit courts to abstain from exercising the jurisdiction conferred under § 1332.

⁸ Appellant further argues that, in any event, this case does not meet the requirements for abstention under *Burford*. Because we hold that the *Burford* doctrine does not apply to suits seeking solely legal relief, we do not reach this question.

⁹ 28 U.S.C. § 1332 provides: "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs and is between . . . citizens of different states"

Although courts have consistently construed congressional grants of jurisdiction as imposing on federal courts a "virtually unflagging obligation . . . to exercise the jurisdiction given them," e.g., *Colorado River*, 424 U.S. at 817, the Supreme Court has decided that Congress intended to leave the judiciary a degree of discretion in a small subset of cases. Historically, courts of Chancery exercised significant discretion in determining whether to grant equitable relief, as did common law courts in issuing the "prerogative writs" of habeas corpus, certiorari, mandamus and prohibition. See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 572 (1985). Early courts did not have comparable discretion to decline to grant ordinary legal relief. *Id.* at 571-72. The First Judiciary Act of 1789, which created the jurisdiction of the federal district courts, apparently was not intended to deprive courts of this equitable discretion. See 1 Stat. 73 (1789). Therefore, courts presumed that they retained the ability to refuse equitable relief or even decline to hear cases in equity. See *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500-501 (1941); *NOPSI*, 491 U.S. at 359. The Supreme Court subsequently created rules for the exercise of this discretion to decline to hear cases in equity, developing several doctrines of abstention. See, e.g., *Colorado River*, 424 U.S. 800; *Younger v. Harris*, 401 U.S. 37 (1971); *Burford*, 319 U.S. 315; *Pullman*, 312 U.S. 496.

In *Burford*, the Supreme Court explicitly premised its order of abstention on the power, unique to courts of equity, to refuse, for policy reasons, to exercise their jurisdiction:

Although a federal *equity court* does have jurisdiction of a particular proceeding, it may, in its sound discretion . . . refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest. . . .

319 U.S. at 317-18 (quotation marks and citations omitted) (emphasis added). In *Alabama Public Service*

Commission v. Southern Ry. Co., 341 U.S. 341 (1951), the only other case in which the Supreme Court has upheld a *Burford* abstention, the power to abstain was again grounded in the discretion afforded equitable courts in granting relief:

This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts On the contrary, it is but a recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer . . .

It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

341 U.S. at 350-51 (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-98 (1943)) (emphasis added).

Burford abstention is not the only abstention doctrine grounded in the unique power of courts of equity. Cases involving other abstention doctrines also emphasized that the source of the courts' authority to develop a doctrine of abstention was based upon the discretion to decline or grant equitable relief. See *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964); *Younger*, 401 U.S. at 43; *Pullman*, 312 U.S. at 500-501.

The reasoning of *Burford*, *Pullman* and the other cases locating the power to abstain in the unique powers of equitable courts has never been rejected. The Supreme Court has, however, subsequently applied some forms of abstention doctrine to cases at law, without discussion.¹⁰

¹⁰ See *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960).

Furthermore, the Supreme Court explicitly expanded some forms of abstention to a few "special" classes of damage actions.¹¹ These cases were severely criticized by dissenting justices. In his dissent in *Fair Assessment in Real Estate Association v. McNary*, Justice Brennan pointed out that "[w]hile the 'principle of comity' may be a source of judicial policy, it is emphatically no source of judicial power to renounce jurisdiction. . . . There is little room for the 'principle of comity' in actions at law where, apart from matters of administration, judicial discretion is at a minimum." 454 U.S. 100, 119-21 (1981) (Brennan, J., dissenting).

The recent Supreme Court decision in *NOPSI* suggests a renewed recognition that the power of federal courts to abstain from exercising their jurisdiction, at least in *Burford* abstention cases, is founded upon a discretion they possess only in equitable cases. The Court noted that the authority to abstain is rooted in the "federal courts' discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted." 491 U.S. at 359. The Court made clear that this discretion in granting "certain types of relief" belongs to "a federal court sitting in equity [which] must decline to interfere with the proceedings or orders of state administrative agencies" when the *Burford* criteria are met. 459 U.S. at 361 (emphasis added). By locating the source of the power to abstain in historical equitable discretion, while also reminding courts that their obligation to hear cases within their jurisdictional grants is

¹¹ See *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 (1981) (citing the "important and sensitive" nature of challenges to state tax systems); *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28 (1959) ("Although an eminent domain proceeding is deemed for certain purposes of legal classification a 'suit at common law' . . . it is of a special and peculiar nature").

"virtually unflagging," *id.*, the Supreme Court gave strong indication that the power to abstain under *Burford* should not apply in suits at law.

NOPSI provided such a strong affirmation of *Burford* abstention's ties to equity that other circuits have been provoked to reconsider the application of *Burford* abstention to cases at law. The Third Circuit declined to follow a prior case that had applied *Burford* to damage actions because the prior case "predated *NOPSI*, and the Supreme Court in *NOPSI* has given no indication that the distinction between legal and equitable relief has been diluted." *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 272 (3d Cir. 1991) (rejecting *Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033 (3d Cir. 1988)); *see also Fragoso v. Lopez*, 991 F.2d 878, 882 (1st Cir. 1993) (stating that in light of *NOPSI*, the fact that the plaintiffs sought only legal relief was a reason to decline to apply *Burford* abstention); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 270 D. Vt. 1993) (finding, in a case between a reinsurer and state insurance commissioner acting as liquidator for an insolvent insurer, that *NOPSI* limits *Burford* abstention to equitable cases); *Duane v. Government Employees Ins. Co.*, 784 F. Supp. 1209, 1223 (D.Md. 1992) (holding that *Burford* abstention is limited to equitable cases).

The Supreme Court's recent, restrictive reading of *Burford*, together with its reaffirmation of the doctrine's equitable predicate, leads us to conclude that a district court may not abstain under *Burford* when the plaintiff seeks only legal relief.

The district court's remand order is VACATED and the case is REMANDED for proceedings consistent with this opinion.

APPENDIX B

[Filed July 1, 1991]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 90-4713-WMB

ROXANI GILLESPIE, Insurance Commissioner of the State of California, in her capacity as LIQUIDATOR OF MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY, and MISSION REINSURANCE CORPORATION,

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, et al.,
Defendants.

ORDER

This action arises out of the efforts of the California Commissioner of Insurance ("the Commissioner") to liquidate the Mission Group of Insurance companies and obtain reinsurance proceeds from numerous reinsurers, including defendant Allstate Insurance Company ("Allstate"). To date, this effort has been conducted in state court. Allstate removed the case against it to this Court and the Commissioner now seeks to remand the case back to state court. Although defendant has presented a cogent and relatively novel argument urging that the *Burford* abstention doctrine be construed very narrowly, the Court finds that abstention is appropriate in this case; accordingly, the Commissioner's motion to remand is granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

A group of insurance companies, the "Mission Companies,"¹ were ordered into conservatorship by the Los Angeles County Superior Court ("the Liquidation Court") in late 1985. On February 24, 1987, the same court ordered that the Mission Companies be liquidated. In August of 1990, the Liquidation Court approved a series of transactions including a transfer of the assets and liabilities of the Mission Companies into trusts and appointment of plaintiff-Commissioner as trustee of those trusts.²

In accordance with her statutory authority, Commissioner Gillespie³ filed suit on December 22, 1986 against approximately 300 reinsurers of the Mission Companies seeking to recover money allegedly due the Mission Companies under various reinsurance agreements. That case was filed in L.A. Superior Court (Case No. C629709, "*Gillespie I*") and later consolidated with the liquidation proceedings (Case No. C572724). Judge Kurt J. Lewin has presided over the Superior Court proceedings in *Gillespie I*, developing an intimate familiarity with the facts giving rise to this litigation.

A critical issue in all these liquidation-related cases,⁴ including this one, is whether or not the reinsurers are

¹ The companies comprising the "Mission Companies" include: Mission Insurance Company and its subsidiaries Mission National Insurance Company and Enterprise Insurance Company; Mission Reinsurance Corporation; and Holland-America Insurance Company.

² The actions of the Liquidation Court are the sole means under the California Insurance Code's statutory framework for an insurance corporation to be rehabilitated, reorganized or liquidated. *California Insurance Code*, §§ 1010 *et seq.*

³ Ms. Gillespie has been succeeded by Mr. Garamendi as California's Insurance Commissioner. This Order will endeavor, therefore, to refer to plaintiff simply as the Commissioner.

⁴ Under Section 1019 of the California Insurance Code, once a liquidation order is issued, as was done here in February of 1987,

entitled to "set-off" amounts allegedly owed to Mission under the reinsurance contracts. If Allstate prevails on its set-off defense, it could deduct the set-off figure directly from the total amount it owes to the Mission companies under the reinsurance agreements. If Allstate's set-off claims are unsuccessful, then it would pay all amounts owed to Mission up front, and Allstate's set-off claims would be treated like any other Class 6 creditor claim against the Mission assets. Practically speaking, then, resolution of this issue will dramatically impact on who ultimately receives the Mission assets.

In June of 1990, the Commissioner filed this action against Allstate and other insurance companies. The complaint alleges causes of action⁵ which are identical to the amended complaint in *Gillespie I*; thus, the only difference in the suits are the named defendants. The complaint was served on Allstate and one other insurer (Insurance Company of North America, INA) in August of 1990. A notice of related case accompanied the complaint, and the action was referred to Judge Lewin.

Allstate sought removal pursuant to 28 U.S.C. § 1441 (c) on the ground that the Commissioner's claims against Allstate would have been removable under the Court's diversity jurisdiction if sued upon alone, and were "separate and independent" of claims asserted against other defendants in this action. At that time, complete diversity was lacking. Upon petitioning for removal, Allstate simultaneously sought an order compelling arbitration of the Commissioner's claims against Allstate, as allegedly

the rights and liabilities of all creditors and debtors shall be fixed as of the date the order was entered. Thus, according to the Commissioner, Allstate's remedies in this action are only those permitted by the insolvency statutes.

⁵ These causes of action are for: declaratory relief; suit on contract; conspiracy to breach and to commit tortious breach and tortious breach of the implied covenant of good faith and fair dealing; and conspiracy to commit tort and tortious denial of the existence of contracts.

mandated by the reinsurance contracts between Allstate and the Mission companies.

The Commissioner moved to remand this action. At the initial hearing, the Court intimated that the action would be remanded on abstention grounds, in particular under the *Burford* doctrine,⁶ and formally took the matter under submission.

While the matter was pending, the Commissioner dismissed all non-diverse defendants in the state court action, and Allstate filed a Supplemental Notice of Removal, reciting the presence of complete diversity in this lawsuit as an additional ground for removal. The parties then briefed and reargued the remand motion.

II. DISCUSSION

The Commissioner advances three contentions⁷ in support of its remand motion: (1) that the Court lacks jurisdiction over this dispute due to the Liquidation Court's *in rem* jurisdiction over the assets of the Mission Companies; (2) that abstention is appropriate under *Colorado River*; and (3) that abstention is warranted under the *Burford* doctrine. While basing this holding on *Burford*, the Court will first address plaintiff's other grounds for remand.

A. The Court Has Jurisdiction Over This Dispute

In a supplemental order issued April 25, 1990, Judge Lewin stated that:

This Court continues and reaffirms its assumption of exclusive and continuing jurisdiction over all of the

⁶ *Burford v. Sun Oil Co.*, 63 S.Ct. 1098 (1943).

⁷ Initially, the Commissioner also argued that Allstate's claims were not "separate and independent" from the plaintiff's claims against the other reinsurers; thus, removal under 28 U.S.C. § 1441(c) was inappropriate. The presence of complete diversity, however, moots the question of whether or not this action was improvidently removed under 28 U.S.C. § 1441(c).

[assets of the Mission Companies] . . . and continues to assume sole and exclusive jurisdiction to administer [assets] and to determine the validity or invalidity of any and all claims to or affecting such assets.

Final Order of Rehabilitation, paragraph 5 (Exhibit L to plaintiff's Request for Judicial Notice).

By issuing this supplemental order, the Commissioner argues that the Liquidation Court has exercised *in rem* jurisdiction over the *res* of the Mission Company assets, and that these assets include any potential payment of reinsurance balances owed. Thus, the Commissioner urges this Court to follow the rule that where a court has taken property into its possession, that property is withdrawn from the jurisdiction of all other courts. *Lion Bonding & Surety Co. v. Karatz*, 43 S.Ct. 480, 484 (1923). "Possession of the *res* disables other courts of coordinate jurisdiction from exercising any power over it." *Id.*⁸

The Court finds this argument unpersuasive. As Allstate correctly observes, the Liquidation Court has issued other orders authorizing the Commissioner to seek redress in other forums, including federal court. Thus, plaintiff's suggestion that this Court lacks the competency to adjudicate matters affecting the Mission *res* rings somewhat hollow.

In addition, many of the cases the Commissioner cites in support of this jurisdictional argument involve a state court which has taken *in rem* jurisdiction over a particular asset or estate, and then another court was asked to assert *in rem* jurisdiction over the same assets. For example, in *Lion Bonding*, a state court had appointed

⁸ In *Lion Bonding*, the Supreme Court held, *inter alia*, that a federal court in Minnesota could not take the *res* out of the possession and control of a Nebraska state court arising from the insolvency of the Lion Bonding & Surety Company.

receivers for an insolvent insurer and had vested the receivers with title to the insolvent's assets. Thereafter a creditor of the insolvent brought a federal court suit seeking the appointment of another receiver and an order vesting him with title to the assets—i.e., an order “to take the res out of the possession and control of the state court” and transfer it to a federal receiver. *Lion Bonding*, 43 S.Ct. at 484.⁹

Other cases have disputed whether the potential for reinsurance balances may be characterized as part of any *res*. In *Slotkin v. Brookdale Hosp. Center*, 357 F. Supp. 705 (S.D.N.Y. 1972), the plaintiff sued a state insurance commissioner acting as liquidator of an insolvent insurer. In rejecting the commissioner's argument that hearing the suit would interfere with the state court's *in rem* jurisdiction, the court stated:

‘[W]here the State Court has control of the administration of . . . [an] estate, an action *in personam* may be instituted in the federal court . . . to establish the validity and amount of a claim against the estate, since the federal court's action in no way interferes with the state court's control of the *res*.’ [citations omitted]. . . This cause of action, to decide a claim against funds being administered by the State court, in no way interferes with the State's custody or control of the *res*.

Slotkin, 357 F. Supp. at 707-708.

Similarly, the court in *Fabe v. Columbus Ins. Co.*, LEXIS No. 2650 (Ohio App. June 26, 1990), stated:

⁹ Also, *Underwriters Nat'l Assurance Co. v. North Carolina Life*, 102 S.Ct. 1357 (1982), is not on point because the dispute there centered on which state court (either Indiana or North Carolina) had jurisdiction over a \$100,000 “financial security” deposit made by an Indiana stock insurance corporation who did business in North Carolina. The thrust of the holding involved enforcement of “the full faith and credit” clause as between two states, and did not address the jurisdiction of a federal court in disputes such as this one.

“[u]ntil the dispute regarding ownership of the funds is resolved, those funds are not part of the assets over which plaintiff [insurance commissioner] has control.”¹⁰

For these reasons, the Court finds that it has jurisdiction to rule on this case.¹¹ The question then becomes whether the Court should refrain from exercising its jurisdiction under any of the established abstention doctrines.

B. Abstention Under *Colorado River* is Inappropriate

In *Colorado River Water Conservation District v. United States*, 96 S.Ct. 1236 (1986), the Supreme Court found that a district court may stay or dismiss an action in light of a concurrent state proceeding if it comports with a sense of “wise judicial administration” which gives “regard to conservation of judicial resources and comprehensive disposition of litigation.” *Colorado River*, 96 S.Ct. at 1246.

The Supreme Court enumerated several factors for a district court to consider when determining the applicability of this abstention doctrine: whether a court has obtained *in rem* or *quasi in rem* jurisdiction over the property subject to dispute;¹² the inconvenience of the

¹⁰ See also, *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 702-03 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 1568 (1989) (in holding that district court should have abstained from hearing an insurance commissioner's declaratory rights claim against a diverse reinsurer, the court rejected the proposition that “a state statute, even when buttressed by the federal policy expressed in the McCarran-Ferguson Act, can affect the invocation of federal diversity jurisdiction.”)

¹¹ The Commissioner also observes that the exclusive jurisdiction assumed by the Liquidation Court is intended to protect the *res* from one of the most *res*-dissipating expenses—litigation expenses caused by a multitude of law suits filed in a multitude of forums. While this observation may be true, the Court believes it applies more directly to the dispositive issue of federal abstention than to that of this Court's jurisdictional capacities.

¹² This issue has been addressed earlier.

federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. *Id.* at 1246-47. "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required." *Id.* at 1247.

The Commissioner asserts that these factors militate toward abstention in that: the Liquidation Court has purportedly exercised *in rem* jurisdiction over Mission's assets; a ruling by this Court would definitely result in piecemeal adjudication of the Mission Liquidation; and the state forum (and Judge Lewin in particular) has been wrestling with this case for the past two years, developing an unmatched expertise in this reinsurance dispute. Moreover, the Commissioner contends that the facts of *Colorado River* parallel those in the case at bar. Specifically, in *Colorado River* the federal court, pursuant to the McCarran Amendment,¹³ gave deference to Colorado's comprehensive "prior appropriation" scheme for adjudication of water rights. Similarly, the Commissioner urges this Court, pursuant to the McCarran-Ferguson Act,¹⁴ to defer to California's comprehensive Insurance Code statutes governing insurance company rehabilitation and liquidation.

Allstate responds first by observing that the entire doctrine is applicable only in exceptional circumstances because federal courts have an "unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River*, 96 S.Ct. at 1246. Allstate also points to *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 103 S.Ct.

¹³ This amendment, codified at 43 U.S.C. § 666, gives federal consent to state jurisdiction over the United States in state court actions involving water rights.

¹⁴ Codified at 15 U.S.C. § 1011 *et seq.*, this Act exempts insurance companies from federal regulation, placing the policing of this industry in the exclusive control of the states.

927 (1983), wherein the Supreme Court held that it was an abuse of discretion for a district court to abstain from a dispute in which a party sought to enforce its right to compel arbitration under the Federal Arbitration Act, just as Allstate seeks to do in this case.

In *Cone*, the hospital sued in state court for a declaratory judgment that it owed Mercury nothing under a contract to build a hospital addition, and that Mercury had waived its right to compel arbitration of the dispute. Mercury subsequently filed a diversity-of-citizenship action in federal district court seeking an order compelling arbitration under § 4 of the Arbitration Act. The district court stayed the federal case due to the pendency of parallel state litigation. The Supreme Court affirmed the Fourth Circuit's reversal, rejecting the "piecemeal litigation" prong of *Colorado River*:

It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

Cone, 103 S.Ct. at 939.¹⁵

¹⁵ The Supreme Court also observed in *Cone* that an "important reason against allowing a [federal] stay" was the substantial doubt whether "Mercury could obtain from the state court an order compelling the Hospital to arbitrate." *Cone*, 103 S.Ct. at 942. Allstate stresses that the danger is even greater here in that the Liquidation Court has already denied one party's motion to compel arbitration under a similar reinsurance contract.

Cone may be distinguished from this case on several grounds. First, the public policy interest involved here—insurance regulation—is fundamentally more important to the state than *Cone*'s simple contract dispute. Second, the underlying dispute here is between the Commissioner and virtually hundreds of reinsurers; thus, the danger in piecemeal litigation (a *Colorado River* factor) is significantly greater here than in the three-party (*Cone* Hospital, Mercury Construction, and the architect) dispute of *Cone*. Third, the Liquidation Court has been addressing the Mission Companies litigation for two years and has developed considerable expertise in this area. This period is considerably longer than the 19 day difference between filings in *Cone*. “[P]riority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions.” *Cone*, 103 S.Ct. at 940.¹⁶ Finally, here the state court has at least a colorable claim to *in rem* jurisdiction over the Mission Company assets. This *Colorado River* factor was clearly absent in *Cone*.

Although *Cone* is distinguishable from the instant action, and despite the fact that the *Colorado River* factors militate in favor of abstention, the Court finds that this doctrine is inapplicable to the instant action. As Allstate accurately observes, *Colorado River* applies only to concurrent litigation. In *FDIC v. Nichols*, 885 F.2d 633, (9th Cir. 1989), the Ninth Circuit expressly observed that *Colorado River* abstention is available “only ‘in situations involving the *contemporaneous* exercise of concurrent jurisdictions, either by the federal courts or by state and federal courts.’” *Nichols*, 885 F.2d at 638 (quotation omitted) (emphasis in original). Here concurrence is lacking because Allstate—depending on the outcome of this motion—will be in either state or federal court,

¹⁶ The Court acknowledges that this point is weakened by the fact that Allstate has been a party to the Mission litigation only since February of 1990.

but not both. Therefore, the Court finds that Allstate is not subject to this abstention doctrine.

In so holding, the Court acknowledges that this distinction benefits defendants like Allstate who, rather than file a separate, diversity-based motion to compel arbitration, first remove themselves from the state proceeding and then seek arbitration. While hesitant to base decisions on procedural technicalities, the Court finds the law concerning this doctrine clear. The *Colorado River* abstention doctrine is based on a “wise judicial administration” philosophy aimed at avoiding duplicative litigation. Here, the doctrine is not implicated because there is no concurrent state action to which Allstate is a party; thus, there is less risk of duplication.

C. *Abstention is Warranted Under Burford*

Under *Burford v. Sun Oil Co.*, 63 S.Ct. 1098 (1943), a federal court may abstain from a case where its disposition of the matter would disrupt an important state policy. *Id.* at 1105-08. In *Burford*, the district court abstained from reviewing the validity of an order issued by the Texas Railway Commission allowing Burford to drill four oil wells. The Commission had been given broad discretion to regulate the state's oil and natural gas resources, and the State had established an elaborate review system for regulating this industry.

The Commissioner contends that California has enacted a comprehensive scheme to regulate the business of insurance, and it is this statutory scheme that vests control of the Mission Companies exclusively in the Liquidation Court. This control extends to the Commissioner in his capacity as rehabilitator or receiver. In short, the complex statutes of the *California Insurance Code*, Sections 1010 *et seq.*, are intended to prevent interference with the insolvency proceeding.¹⁷ Deference to the Liquidation

¹⁷ The Commissioner quotes from § 1020 which provides:

Court's jurisdiction will allow what has been an orderly liquidation of the Mission Companies to proceed undisturbed.

The Commissioner points to a host of insurance cases where the court declined to exercise jurisdiction based on the *Burford* abstention doctrine. In particular, plaintiff emphasizes: *Grimes v. Crown Life Insurance Company*, 857 F.2d 699 (10th Cir. 1988) *cert. denied*, 109 S.Ct. 1568 (1989); *Corcoran v. Universal Reinsurance Corp.*, 713 F. Supp. 77 (S.D.N.Y. 1989) ("*Corcoran*"); and *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2nd Cir. 1988) ("*Ardra*").

In *Grimes*, The Oklahoma Insurance Commissioner, as liquidator of an insolvent insurer, filed a declaratory relief action seeking to establish rights under a reinsurance agreement between the liquidated insurer and Crown Life. Crown removed the case from state court on the basis of diversity jurisdiction, and the Commissioner appealed. The Tenth Circuit, following the *Burford* abstention doctrine, held that the district court should not have heard the action. *Grimes*, 857 F.2d at 706.

The fundamental question in *Grimes*—whether the reinsurance contract complied with the requirements of an Oklahoma statute so as to require the reinsurer to bear the risk for the primary insurer's insolvency—was one "of state law which affect[s] the fundamental purposes of a state liquidation proceeding." *Id.* at 705. The interpretation of this statutory provision would impact on the

Upon the issuance of an order either under Section 1011 or 1016, or at any time thereafter, the court shall issue such other injunctions or orders as may be deemed necessary to prevent any or all of the following occurrences:

- (a) Interference with the Commissioner or the proceeding.
- (b) Waste of assets of such person.
- (c) The institution or prosecution of any actions or proceedings...

Commissioner's power to collect on reinsurance agreements entered into by a liquidated company. Such a ruling by any court would greatly affect an important state right; namely, the state's ability to administer a comprehensive insurance regulatory scheme. This same important state interest would be affected if this Court were to rule on Allstate's motion.

The *Grimes* court also noted that interpretation of the Oklahoma statute might require a ruling on another important matter of state law—the reinsurer's ability to reduce any monies owed through a set-off. *Id.* at 706. A major issue in the Commissioner's suit against Allstate (indeed against all the reinsurers) will be the availability of set-offs for the reinsurers. This fact also militates toward remand.

In *Ardra*, New York's Superintendent of Insurance, as liquidator of an insolvent insurer, filed suit in state court against a Bermuda reinsurer and two of its officers. The reinsurer removed and sought an order compelling arbitration, exactly as Allstate has done here. The district court granted the motion to remand, and the Second Circuit approved, finding no abuse of discretion. *Ardra*, 842 F.2d at 37. Specifically, abstention was appropriate in that it accommodated values of judicial economy and comity. *Id.* at 36. The district court noted the importance of state regulation of the insurance industry, and abstained because the suit presented a "novel" issue of state law; namely, the scope of the Superintendent's power to collect on reinsurance agreements entered into by a liquidated company. *Id.* at 37. The Commissioner asserts that the novel issue presented here is the scope of the reinsurers' offset rights.

Finally, in *Corcoran v. Universal Reinsurance Corp.*, 713 F. Supp. 77 (S.D.N.Y. 1989), the Superintendent of Insurance, as Liquidator of the Dominion Insurance Company, brought suit in state court against defendant URC

for monies due under a retrocession agreement.¹⁸ URC raised defenses of set-off and recoupment and petitioned for removal based on diversity. The liquidator moved to remand, arguing that federal jurisdiction was precluded by the McCarran-Ferguson Act and *Burford* abstention principles.

The Court stated that *Burford* abstention is mandated where "the state has a particular interest in a subject of regulation and has devised a unified scheme to deal with that interest." *Corcoran*, 713 F. Supp. at 79. The court further found that to permit a party to evade the state liquidation proceedings by removing an action would encourage other parties to disrupt such a comprehensive adjudicatory scheme, and that it was precisely this type of result the *Burford* rule was designed to prevent. *Id.* at 79-80.

Initially, Allstate counters that these insurance-abstention decisions, based on the autonomy given state insurance regulators under McCarran-Ferguson, are inapposite because the Ninth Circuit has held that the McCarran-Ferguson Act is inapplicable to state insurance liquidation statutes.

In *State of Idaho ex rel. Soward v. United States*, 858 F.2d 445, 452-53 (9th Cir. 1988), the 9th Circuit stated:

Once rendered insolvent and placed in the hands of a liquidator, an insurance company no longer is involved in risk protection. . . . In such a situation, the state is no longer regulating the traditional business of insurance, and thus, has exceeded the boundaries within which the McCarran-Ferguson Act frees it from preemption by general federal statutes.

¹⁸ A retrocession agreement is the contract between a reinsurer and its retrocessionaire. It is the reinsurance of reinsurance.

The holding in *Soward*, however, was that a federal insolvency statute superseded the state's liquidation framework so as to give the IRS a priority over other creditors of insolvent insurers. While it is true, as Allstate points out, that the Ninth Circuit declared that liquidation proceedings do not constitute the "business of insurance" so as to warrant complete state autonomy under McCarran-Ferguson, this declaration was made in the context of protecting a Constitutionally mandated federal right (i.e. the right to tax). "The enforcement of tax obligations pursuant to Article I § 8 of the Constitution represents a . . . compelling federal regulatory interest that militates against the diminution or supersession of federal authority." *Soward*, 858 F.2d at 451. The right to compel arbitration, while a valid interest, hardly rises to the Constitutional level as the right to tax found in *Soward*.¹⁹

Thus, even if *Soward* is taken at face value, that preemption-based holding would not preclude abstention under *Burford* in this case. In *Lac D'Amiante du Quebec v. American Home Assurance Co.*, 864 F.2d 1033 (3d Cir. 1988), the Third Circuit acknowledged the finding in *Soward* and then stated:

[i]n the case at bar, however, we are not wrestling with the question of whether a federal statute is preempted by the provision of McCarran-Ferguson stating that federal statutes may not impair the operation

¹⁹ Moreover, the Federal insolvency statute was directly at odds with Idaho's creditor priority scheme. In such instances, the Supremacy Clause often dictates that federal law shall prevail. Here, the conflict between California's liquidation scheme and the Federal Arbitration Act is not nearly so direct.

In *Soward*, the IRS persuasively argued that Congress could not have intended to allow states to redefine the taxes owed to the Federal government under the auspices of McCarran-Ferguson. It is similarly doubtful whether Congress, through the Arbitration Act, intended to undermine a state's ability to orderly administer the important state function of insurance regulation.

of state statutes regulating the business of insurance. Rather we must decide whether a federal court properly declined to abstain in favor of the state scheme. The McCarran-Ferguson Act seems relevant to this inquiry even if we are unconvinced that the Act preempts the federal statute extending diversity jurisdiction to the federal courts when it impairs a state liquidation proceeding. Reliance on McCarran-Ferguson in the abstention context thus does not require us to discern whether state regulation of insurer insolvencies constitutes regulation of the business of insurance for other purposes.

D'Amiante, 864 F.2d at 1039²⁰ Thus, *Soward's* depiction of the 'business of insurance' in a preemption dispute does not necessarily resolve this abstention issue.

Allstate, relying primarily on *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 109 S.Ct. 2506 (1989) ("*NOPSI*"), also argues that the Supreme Court has drastically narrowed the reach of the *Burford* abstention doctrine in two important respects which make its applicability to the instant action improper. First, Allstate argues that under *NOPSI*, *Burford* applies only to federal district courts acting in equity, not when the action is for legal damages as is the case here. Second, Allstate avers that abstention applies only when a federal ruling would disrupt a state administrative proceeding or order, and not a judicial action as is the case here.

To support this restrictive view of *Burford*, Allstate quotes a passage from *NOPSI* where the Supreme Court described the *Burford* abstention doctrine as follows:

Where timely and adequate state court review is available, a federal court *sitting in equity* must decline to interfere with the *proceedings or orders of*

²⁰ The Court cites to *D'Amiante* notwithstanding the Third Circuit's subsequent retreat from this case in *University of Maryland*, discussed *infra*.

state administrative agencies: (1) where there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

NOPSI, 109 S.Ct. at 2514 (emphasis added) (quoting *Colorado River Water Conservation Dist. v. United States*, 96 S.Ct. 1236, 1245 (1976)).

The Supreme Court further observed that *Burford* is concerned with "protecting state administrative processes from undue federal interference, and does not require abstention whenever there exists such a process, or even in all cases where there is a potential for conflict with state regulatory law or policy." *NOPSI*, 109 S.Ct. at 2514.

NOPSI's limitation of *Burford* to equitable actions, Allstate asserts, is no accident because it was in such actions that the doctrine originated; moreover, the potential for some direct affront to a state proceeding or policy is much greater in an equitable action. The Court is not prepared to curtail the scope of *Burford* as drastically as Allstate would have it.

In *NOPSI*, the Federal Energy Regulatory Commission (FERC) allocated the cost of a nuclear reactor among several companies, including petitioner New Orleans Public Service, Inc. (*NOPSI*). *NOPSI*, which provides retail electrical service to New Orleans, then sought, from respondent New Orleans City Council, a rate increase to cover the increase in its wholesale rates resulting from the FERC's allocation of the nuclear reactor costs. The Council determined that the allocation costs should not

be completely reimbursed through a rate increase because NOPSI was negligent in failing to diversify its supply portfolio. NOPSI then filed a state suit challenging the ratemaking order of the City Council. NOPSI also filed a federal action seeking to declare that the order was preempted by federal law under a Supreme Court case²¹ which held that, for purposes of setting intrastate retail rates, a state may not differ from FERC's allocation of wholesale power by imposing its own judgment. The district court abstained from hearing the case on both the *Burford* and *Younger* doctrines, and the Fifth Circuit affirmed.

The Supreme Court reversed. The Court first restated the general rule that federal courts should not abdicate their authority in the absence of exceptional circumstances. One recognized exception is the *Burford* abstention doctrine; however, it was inapplicable in *NOPSI* because:

NOPSI's primary claim is that the Council is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs. Unlike a claim that the state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of 'an essentially local problem.'

NOPSI, at 2515-15 (citations omitted).

In short, *NOPSI* found *Burford* inapplicable because the district court there needed only to inquire into the "four corners of the Council's retail rate order . . . to determine whether it is facially pre-empted by FERC's allocative decree and relevant provisions of the Federal

²¹ *Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986).

Power Act . . . [and] would not unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity." *Id.* at 2515.

This traditional interpretation of the *Burford* doctrine in *NOPSI* does not mandate that *Burford* be rejected here where a federal ruling on Allstate's case would risk inconsistent adjudications on important state issues such as a reinsurer's right to a set-off. This certainly would undermine a state's interest in uniform insurance laws and unfragmented liquidation proceedings.

Allstate also cites *University of Maryland at Baltimore v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991), as support for its assertion that *Burford* applies only in equitable actions which affect an administrative proceeding. In *University of Maryland*, the Third Circuit rejected *Burford* abstention in a case where policyholders of an insolvent insurer brought an action against the auditor of the insurer's books. The court's ruling, according to Allstate, was based in part on the ground that: "Here, unlike *Burford* and the other Supreme Court cases involving *Burford* doctrine, the action was at law, not in equity, and sought money damages." *University of Maryland*, 923 F.2d at 271.

Allstate overstates the import of this language. The Third Circuit in *University of Maryland* found *Burford* inapplicable because that doctrine:

"may be ordered in insurer insolvency cases only when one of the parties to the action in which the federal court abstains is the insolvent insurer or its receiver, trustee, officers, and the like. Here, by contrast, the defendant is PMM—a third party that does not fall into any of these categories. . . . This third party's connection to the state regulatory mechanism (governing insolvency proceedings) that *Burford* abstention is designed to protect, is simply too attenuated to justify renunciation of a federal court's obligation to exercise the jurisdiction granted to it by Congress.

University of Maryland, 923 F.2d at 271 (emphasis added). Thus, this case actually acknowledges that *Burford* was designed to protect cases where a receiver/liquidator is a party to a federal suit which might impinge on the state's uniform regulatory scheme. The present action is just a case.

In addition, the *University of Maryland* court discussed whether *NOPSI* narrowed *Burford*'s applicability to federal courts acting in equity:

the Supreme Court stated, admittedly in dictum, that, *Burford* abstention applies to "a federal court sitting in equity." Without reading too much into this dictum, we believe, as noted below, that *NOPSI* generally cautions lower federal courts not to extend *Burford* abstention proper grounds.

University of Maryland, 923 F.2d at 271 (emphasis in original) (citations omitted).

To be sure, *NOPSI* raises the equity-law distinction, and the Third Circuit in *University of Maryland* discusses it and apparently finds validity in this dichotomy. The ultimate holding in *University of Maryland*, however, applies *Burford* in a traditional manner and construes *NOPSI* as an admonition to the courts to guard against extending *Burford* beyond its proper confines. To date, abstention in insurance cases which threaten the uniform implementation of state insurance regulations, such as the case at bar, have regularly been accepted as within the scope of the *Burford* doctrine. See, e.g., *Ardra* and *Grimes*, *supra*, and *Holley v. Great American Life Ins. Co.*, 101 F.2d 172, 176 (8th Cir. 1939), *cert. denied*, 307 U.S. 615. Notwithstanding defendant's well-presented arguments to the contrary, the Court finds that *Burford* warrants abstention here.²²

²² The Commissioner also suggests that the state court liquidation proceedings are equitable in nature because they will determine who receives the Mission *res*; thus, even accepting the argu-

Finally, Allstate suggests that even if *Burford* abstention were applicable, the Court should stay this action pending a California Supreme Court ruling on the controversial issue of state law: whether reinsurers are entitled under the California Insurance Code to set-off reinsurance balances due it from Mission against monies claimed by the Commissioner.²³ Allstate contends that once California's highest court rules on this matter, subsequent tribunals will simply have to apply it. In light of a district court's obligation to exercise its jurisdiction, Allstate believes that a stay is more appropriate than an outright remand.

The Commissioner accurately responds that other federal courts, when considering analogous situations, have remanded the matter to state court after finding abstention to be appropriate. See, *Grimes*, *supra*; and *Ardra*, *supra*. In addition, it is not clear what will be left to adjudicate when and if the California Supreme Court rules on the set-off issue. Therefore, to state that no risk of inconsistent rulings would remain should the Court stay this matter appears to be speculation. Rather than engage in such guess work, the Court chooses to remand this matter to state court, pursuant to *Burford*, where an orderly and comprehensive liquidation of the Mission Companies may be completed.

ment that *NOPSI* restricts *Burford* to courts acting in equity, the Court should still abstain here. While not accepting this characterization of the Superior Court proceedings, the Court does acknowledge that those proceedings are integral to the statutorily-prescribed liquidation process. As such, it should not be fragmented lest California's interest in an orderly liquidation of the Mission companies be undermined. The Court also observes that the liquidation court can be seen as a special court whose existence militates toward abstention. See, *Kirkbride v. Continental Casualty Co.*, 91 D.A.R. 5524, 5525 (9th Cir. May 14, 1991).

²³ This set off issue is apparently before the California Supreme Court.

III. SUMMARY AND CONCLUSIONS

California has an overriding interest in regulating insurance insolvencies and liquidations in a uniform and orderly manner. If the Court were to adjudicate the Commissioner's reinsurance dispute with Allstate, and specifically the hotly contested set-off issue, then this important state interest could be undermined by inconsistent rulings from the federal and state courts.

There is ample precedent supporting the application of *Burford* to insurance cases such as this, and the Court takes guidance from these decisions. In so ruling, the Court refuses to adopt Allstate's interpretation of *NOPSI* which would limit *Burford* to federal courts acting in equity. Although the Supreme Court in *NOPSI* referred to *Burford* in the equity context, the Court believes the crux of *NOPSI* was to caution lower federal courts against an expansion of this abstention doctrine. As demonstrated above, it is precisely in this area—state regulation of insurance proceedings—that *Burford* has been found applicable. Therefore, the Court holds that *Burford* abstention is appropriate here, and the Commissioner's motion to remand this action to state court is granted.

DATED: July 1, 1991

s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

APPENDIX C

[Filed May 19, 1995]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-55855

JOHN GARAMENDI, Insurance Commissioner of the State of California, in his capacity as Liquidator of MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY AND MISSION REINSURANCE CORPORATION, as successor to ROXANI GILLESPIE, Insurance Commissioner of the State of California, in her capacity as Liquidator of MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY AND MISSION REINSURANCE CORPORATION,
Plaintiff-Appellee,

v.

ALLSTATE INSURANCE COMPANY,
Defendant-Appellant,

and

INSURANCE COMPANY OF NORTH AMERICA,
Defendant.

ORDER

Before: FLETCHER, PREGERSON, and NORRIS,
Circuit Judges

In our opinion we held that the abstention doctrine developed in *Burford v. Sun Oil*, 319 U.S. 315 (1943), does not apply to cases in which the plaintiff seeks solely legal relief. In its petition for rehearing, the Commissioner argues, for the first time, that the underlying complaint seeks more than simple legal relief because it includes a request for a declaration that the defendants owe the Commissioner the amounts he seeks in his breach of contract claim. In response, Allstate argues that "[d]eclaratory relief is neither strictly equitable nor legal A particular declaratory judgment draws its equitable or legal substance from the nature of the underlying controversy." *Transamerica Occidental Life Ins. Co. v. Digregorio*, 811 F.2d 1249, 1251 (9th Cir. 1987). It is Allstate's position that in this case, the nature of the underlying controversy to enforce a reinsurance agreement makes the declaratory relief requested clearly legal.

We do not address this argument because the Commissioner waived it by failing to raise it prior to his petition for rehearing. "Ordinarily, arguments not timely presented are deemed waived. . . . This general doctrine of waiver applies to arguments raised for the first time in a petition for rehearing." *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992) (citing *United States v. Lewis*, 798 F.2d 1250, 1250 (9th Cir. 1986)). In this case, Allstate clearly argued on appeal that the *Burford* abstention doctrine was inapplicable to suits seeking solely legal relief and that the complaint in this case was properly characterized as a suit at law for money damages. In response, the Commissioner chose to limit his response to arguing that the *Burford* abstention doctrine was applicable to suits seeking only legal relief. He did not argue that his complaint was properly characterized as seeking both legal and equitable relief.

We further reject the Commissioner's other arguments for rehearing this case.

The panel has voted unanimously to deny the petition for rehearing. Judges Fletcher and Pregerson vote to reject the suggestion for rehearing en banc and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

STATUTES INVOLVED

The McCarran-Ferguson Act, codified at 15 U.S.C. §§ 1011-1015, provides as follows:

§ 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Antitrust Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of

October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

§ 1014. Applicability of National Labor Relations Act and Fair Labor Standards Act of 1938

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

§ 1015. Definition of "State"

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

The pertinent provisions of the California Insurance Code, codified as Cal. Ins. Code §§ 900-900.2, 900.9, 903-903.5, 905-911, 922.1-923.5, 925, 925.2, 925.4, 1010-1042, 1056.5-1064.12, provide as follows:

ARTICLE 10. FINANCIAL STATEMENTS OF INSURERS

§ 900. Annual filing

On or before the first day of March of each year every insurer doing business in this State shall make and file with the commissioner, in triplicate, statements exhibiting

its condition and affairs as of the thirty-first day of December then next preceding.

§ 900.2. Annual audit

(a) All insurers doing business in this state shall have an annual audit by an independent certified public accountant. The audit shall be conducted and the audit report prepared and filed in conformity with the Annual Audited Financial Reports instructions contained in the annual statement instructions as adopted from time to time by the National Association of Insurance Commissioners.

(b) The commissioner may grant a 30-day extension of the filing date upon a showing by the insurer and its independent certified public accountant of the reasons for requesting that extension and the determination by the commissioner of substantial cause for an extension. The request for an extension shall be submitted in writing not less than 20 days prior to the due date in sufficient detail to permit the commissioner to make an informed decision on the requested extension.

(c) The commissioner may promulgate regulations to further the purposes of this section.

§ 900.9. Officer or employee signing or filing false report or statement; punishment

Any officer, director, employee or agent of any insurer, who wilfully signs or files a false or untrue report or statement of the business, affairs, or condition of such insurer with intent to deceive any public officer, office, or board to which such insurer is required by law to report, or which has authority by law to examine into its affairs or transactions, is guilty of a felony.

§ 903. Verification of statements

The commissioner shall require statements and reports to be verified as follows: (a) If made by a domestic corporation, by the oaths of any two of the executive

officers thereof. (b) If made by an individual or firm, by the oath of such individual or a member of the firm. (c) If made by a foreign insurer, by the oath of the principal executive officer thereof, or manager, residing within the United States.

§ 903.5. Affidavit of officers

In any case where an insurer is required by law to file with the commissioner statements or reports respecting its financial condition, income or disbursements, verified or signed by its designated officers, agents, or employees, the commissioner may accept and file the statement or report verified by affidavit of the president or vice president and the treasurer or secretary of such insurer, in lieu of the verification or signature otherwise prescribed by law.

§ 905. Statement of insurer other than life

Such statement, if made by other than a life insurer, shall show the following matters relating to its condition and affairs.

§ 906. Capital stock; paid-in capital

First—Such statement shall show (a) in the case of an incorporated insurer having a capital stock, the amount of its capital stock, or (b) in any other case, the amount of the insurer's paid-in capital.

§ 907. Assets

Second—Such statement shall also show the property or assets held by the insurer, specifying:

- (1) The value of real property held by it.
- (2) The amount of cash on hand and deposited in banks to its credit.
- (3) The amount of cash in the hands of agents, and in course of transmission.

(4) The amount of loans secured by mortgages which are a first lien on real property, on which there is less than one year's interest due or owing.

(5) The amount of loans on which interest has not been paid within one year previous to such statement.

(6) The amount due the insurer upon which judgments have been obtained.

(7) The amount of bonds of this State, of the United States, or any incorporated city of this State, and of any stocks and other bonds owned by the insurer, specifying the amount, number of shares, and par and market value of each kind of bond or stock.

(8) The amount of stocks and bonds held as collateral security for loans, with the amount loaned on each kind of stock or bond, its par value and its market value.

(9) The amount of unpaid interest due, and of unpaid interest accrued but not yet due.

(10) The amount of all other loans made by the insurer, specifying the same.

(11) The amount of premium notes on hand on which policies are issued.

(12) All other assets belonging to the insurer, specifying each.

§ 908. Liabilities

Third—Such statement shall also show the liabilities of the insurer, specifying:

(1) The amount of losses due and unpaid.

(2) The amount of claims for losses resisted by the insurer.

(3) The amount of losses in process of adjustment or in suspense, including all reported or supposed losses.

(4) The amount of dividends declared, due, and remaining unpaid.

(5) The amount of dividends declared, but not due.

(6) The amount of money borrowed and security given for the payment thereof.

(7) Gross premiums, without any deductions, received and receivable upon all unexpired risks, reinsurance thereon pro rata.

(8) Amount reclaimable by the insured on perpetual fire insurance policies, being 95 percent of the premiums or deposit received.

(9) Reinsurance fund and all other liabilities, except capital.

(10) Unused balances of bills and notes taken in advance for premiums on open marine and inland policies, or otherwise, returnable on settlement.

(11) Principal unpaid on script or certificates of profits, which have been authorized or ordered to be redeemed.

(12) Amount of all other liabilities of the company, specifying each liability.

§ 909. Income

Fourth—Such statement shall also show the income of the company during the preceding year, specifying:

(1) Cash premiums received.

(2) Notes received from premiums.

(3) Interest money received, specifying the source.

(4) Income received from all other sources, specifying the source.

§ 910. Expenditures

Fifth—Such statement shall also show the expenditures of the preceding year, specifying:

- (1) The amount of losses paid.
- (2) The amount of dividends paid.
- (3) The amount of expenses paid, including commissions and fees to agents and officers of the insurer.
- (4) The amount paid for taxes.
- (5) The amount of all other payments and expenditures.

§ 911. Premiums

Sixth—Such statement shall also show the amount of premiums on insurance on subject matter in this State.

§ 922.1. Deductions from liabilities; reinsured risks other than life insurance risks

Subject to the limitations contained in Sections 922.2 to 922.8, inclusive, the following deductions may be made from the liabilities required to be shown by this article for risks other than life insurance risks in the event that the whole or any portion of the risks insured by an insurer has been reinsured by another insurer:

- (a) The amounts recoverable by the insurer from such reinsurer for losses due and unpaid, for claims for losses resisted by the insurer and for losses in process of adjustment or in suspense including all reported or supposed losses.
- (b) The ratable portion of the gross unearned premium on the risks so reinsured except in the case of excess loss and catastrophe reinsurance where the deduction shall be on the basis of the actual reinsurance premiums and actual reinsurance terms.

§ 922.15. Nonadmitted insurers; deductions from liabilities; reinsured life insurance risks

Subject to the limitations contained in Section 922.2, 922.3, 922.6 and 922.8 with respect to admitted insurers and in Sections 922.2 to 922.6, inclusive, and 922.8 with respect to nonadmitted insurers the following deductions may be made from the liabilities required to be shown by this article for life insurance risks in the event that the whole or any portion of the risk insured by an insurer has been reinsured by another insurer;

- (a) The amounts recoverable by the insurer from such reinsurer for:
 - (1) Claims for death losses and matured endowments due and unpaid,
 - (2) Claims for death losses and matured endowments in process of adjustment or adjusted and not due,
 - (3) Claims resisted by the insurer, and
 - (4) Amounts due and unpaid on annuity claims.
- (b) The ratable portion of:
 - (1) Trust funds on deposit or the net present value of all outstanding policies computed on the standards provided in Section 986, and Articles 3 (commencing with Section 10478) and 3a (commencing with Section 10489.1) of Chapter 5, Part 2, Division 2.
 - (2) Additional trust funds on deposit, or net present value of extra and special risks, including those on impaired lives.
 - (3) Amount of all unpaid dividends of surplus percentage, bonuses and other description of profits to policyholders, and interest thereon, and
 - (4) Amount of any other liability to policyholders or annuitants not included in this section.

In the case of excess loss and catastrophe reinsurance the deduction permitted by this subdivision (b) shall be solely on the basis of the actual reinsurance premiums and actual reinsurance terms.

§ 922.2. Requirements of reinsurance contract

No such deductions specified in Sections 922.1 and 922.15 shall be made or allowed unless the contract of reinsurance contains provision in substance as follows:

The portion of any risk or obligation assumed by the reinsurer, when such portion is ascertained, shall be payable on demand of the ceding insurer at the same time as the ceding insurer shall pay its net retained portion of such risk or obligation, with reasonable provision for verification before payment, and the reinsurance shall be payable by the reinsurer, on the basis of the liability of the ceding insurer under the contract or contracts reinsured without diminution because of the insolvency of the ceding insurer. In the event of insolvency and the appointment of a conservator, liquidator or statutory successor of the ceding company, such portion shall be payable to such conservator, liquidator or statutory successor immediately upon demand, with reasonable provision for verification, on the basis of claims allowed against the insolvent company by any court of competent jurisdiction or by any conservator, liquidator, or statutory successor of the company having authority to allow such claims, without diminution because of such insolvency or because such conservator, liquidator or statutory successor has failed to pay all or a portion of any claims. Payments by the reinsurer as above set forth shall be made directly to the ceding insurer or to its conservator, liquidator or statutory successor, except where the contract of insurance or reinsurance specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer.

The reinsurance agreements may provide that the conservator, liquidator or statutory successor of a ceding

insurer shall give written notice of the pendency of a claim against the ceding insurer indicating the policy or bond reinsured, within a reasonable time after such claim is filed and the reinsurer may interpose, at its own expense, in the proceeding where such claim is to be adjudicated, any defense or defenses which it may deem available to the ceding company or its conservator, liquidator or statutory successor. The expense thus incurred by the reinsurer shall be payable subject to court approval out of the estate of the insolvent ceding insurer as part of the expense of conservation or liquidation to the extent of a proportionate share of the benefit which may accrue to the ceding insurer in conservation or liquidation, solely as a result of the defense undertaken by the reinsurer.

The original insured or policyholder shall not have any rights against the reinsurer which are not specifically set forth in the contract of reinsurance, or in a specific agreement between the reinsurer and the original insured or policyholder.

§ 922.3. Reinsurer's undertaking

No such deductions specified in Sections 922.1 and 922.15, nor any credit whatsoever, shall be allowed in any accounting or financial statement of the ceding insurer in respect to any so-called reinsurance contract unless, in such contract, the reinsurer undertakes to indemnify the ceding insurer, not only in form but in fact, against all or a part of the loss or liability arising out of the original insurance.

§ 922.4. Credit in accounting and financial statements; reinsurance ceded to nonadmitted reinsurer; conditions

Credit in accounting and financial statements on account of reinsurance ceded to a nonadmitted reinsurer other than an alien reinsurer shall be allowed only:

(a) Where it is demonstrated by the ceding insurer to the satisfaction of the commissioner that the reinsurer maintains the standards and meets the financial requirements applicable to an admitted insurer and that it will submit itself to the jurisdiction of the courts of this state, or a court of competent jurisdiction in any state of the United States and designate the commissioner or a designated attorney in this state as its agent for service of process in this state in any action, suit, or proceeding instituted by or on behalf of the ceding insurer for any matter arising out of the reinsurance, or

(b) To the extent of deposits by, or funds withheld from, the reinsurer pursuant to express provision therefor in the reinsurance contract as security for the payment of the obligations thereunder if the deposits or funds are held subject to withdrawal by, and under the control of, the ceding insurer or are placed in trust for those purposes in a qualified United States financial institution if withdrawals from the trust cannot be made without the consent of the ceding insurer. With respect to credit life insurance and credit disability insurance, the deposits or funds shall be deposited in a bank located in California, notwithstanding the fact that the deposits or funds are held subject to withdrawal by, and under the control of, the ceding insurer. For purposes of this subdivision, "qualified United States financial institution" means an institution that (1) is organized, or in the case of a United States Branch or agency office of a foreign banking organization is licensed, under the laws of the United States or any state thereof and has been granted authority to operate with fiduciary powers, (2) is regulated, supervised, and examined by federal or state authorities having regulatory authority over banks and trust companies, and (3) is insured by the Bank Insurance Fund of the Federal Deposit Insurance Corporation.

(c) To the extent that the amount of a clean and irrevocable letter of credit issued for a term of one year

conforming to the requirements set forth below, is a substitute for advances for claims, unearned premium, and all other policy and contract liabilities and reserve obligations to be made by a foreign reinsurer in connection with its liability under a specific reinsurance agreement. The clean and irrevocable letter of credit shall be issued and maintained under arrangements satisfactory to the commissioner as constituting security to the ceding insurer substantially equal to that of a deposit under subdivision (b), and that it shall be (1) issued or confirmed by a banking institution which is a member of the Federal Reserve System and of financial standing satisfactory to the commissioner, (2) issued by a California state chartered bank which is insured by the Federal Deposit Insurance Corporation and meets the conditions established by the commissioner, or (3) issued or confirmed by a United States office of a foreign banking corporation that is (A) licensed under the laws of the United States or any state thereof, (B) regulated, supervised, and examined by an agency of the United States or a state agency having regulatory authority with respect to banks and trust companies, (C) designated by the Securities Valuation Office of the National Association of Insurance Commissioners as meeting its credit standards for issuing or confirming letters of credit, and (D) of a financial standing that is satisfactory to the Commissioner. For purposes of this subdivision, a confirming bank undertakes the identical terms and obligations of the issuer including those set forth herein. The changes enacted to this subdivision at the 1982 Regular Session shall apply only to life insurers.

As used in this section, the terms "deposits" and "funds" include securities authorized as general investments by Article 3 (commencing with Section 1170) of Chapter 2, but not to exceed current market value.

§ 922.5. Credit in accounting and financial statements; reinsurance ceded to alien reinsurer; trust fund; conditions

Credit in accounting and financial statement permitted by this code on account of reinsurance ceded to an alien reinsurer other than one which complies with Article 2 (commencing with Section 1580) of Chapter 4 and includes in the statements required by that article all reserves and liabilities arising out of that reinsurance shall be allowed only:

(a) To the extent of the amount of deposits by, and funds withheld from, the alien reinsurer pursuant to express provision therefor in the reinsurance contract as security for the payment of the obligations thereunder if the deposits or funds are held subject to withdrawal by, and under the control of, the ceding insurer or are placed in trust for those purposes in a qualified United States financial institution, if withdrawals from the trust cannot be made without the consent of the ceding insurer. For purposes of this subdivision, "qualified United States financial institution" means an institution that (1) is organized, or in the case of a United States branch or agency office of a foreign banking organization is licensed, under the laws of the United States or any state thereof and has been granted authority to operate with fiduciary powers, (2) is regulated, supervised, and examined by federal or state authorities having regulatory authority over banks and trust companies, and (3) is insured by the Bank Insurance Fund of the Federal Deposit Insurance Corporation.

(b)(1) Where the alien reinsurer maintains sufficient assets in the United States for the protection of policyholders in the United States and operates its business in a manner which satisfies the commissioner that it maintains standard and financial conditions reasonably comparable to those required of admitted insurers and that it is able to pay losses in the United States and that it

will submit itself to the jurisdiction of the courts of this state, or a court of competent jurisdiction in any state of the United States and designate the commissioner or a designated attorney in this state as its agent for service of process in this state in any action, suit, or proceeding instituted by or on behalf of the ceding insurer for any matter arising out of the reinsurance.

(2) Where it has been demonstrated by any ceding insurer to the satisfaction of the commissioner that the alien reinsurer is a group including incorporated and individual unincorporated underwriters that maintains a trusteed account representing the group's liabilities and attributable to business written in the United States and, in addition, the group maintains a trusteed surplus of which one hundred million dollars (\$100,000,000) shall be held jointly for the benefit of United States ceding insurers of any members of the group, the commissioner shall grant accreditation to the group. The incorporated members of the group shall not be engaged in any business other than underwriting as a member of the group and shall be subject to the same level of solvency regulation and control by the group's domiciliary regulator as are the unincorporated members. The group shall make available to the commissioner an annual certification of the solvency of each underwriter by the group's domiciliary regulator and its independent public accountants.

(c) To the extent that the amount of a clean and irrevocable letter of credit issued for a term of one year conforming to the requirements set forth below, is a substitute for advances for claims, unearned premium, and all other policy and contract liabilities and reserve obligations to be made by an alien reinsurer in connection with its liability under a specific reinsurance agreement. The clean and irrevocable letter of credit shall be issued and maintained under arrangements satisfactory to the commissioner as constituting security to the ceding insurer substantially equal to that of a deposit under

subdivision (a), and that it shall be (1) issued or confirmed by a banking institution which is a member of the Federal Reserve System and of financial standing satisfactory to the commissioner, (2) issued by a California state chartered bank which is insured by the Bank Insurance Fund of the Federal Deposit Insurance Corporation and meets the conditions established by the commissioner, or (3) issued by or confirmed a United States office of a foreign banking corporation that is (A) licensed under the laws of the United States or any state thereof, (B) regulated, supervised, and examined by an agency of the United States or a state agency having regulatory authority with respect to banks and trust companies, (C) designated by the Securities Valuation office of the National Association of Insurance Commissioners as meeting its credit standards for issuing or confirming letters of credit, and (D) of a financial standing satisfactory to the commissioner. For purposes of this subdivision, a confirming bank undertakes the identical terms and obligations of the issuer including those set forth herein. The changes enacted to this subdivision at the 1982 Regular Session shall apply only to life insurers.

(d)(1) When it has been demonstrated by any ceding insurer to the satisfaction of the commissioner that the alien reinsurer is a group of incorporated insurers under common administration that maintains a trust fund in a qualified United States financial institution for the payment of the claims of its United States policyholders and ceding insurers, their assigns, and successors in interest, that has continuously transacted an insurance business outside the United States for at least three years immediately preceding the date of the financial statement for which the ceding insurer is requesting reinsurance credit, that is in good standing with its domiciliary regulator, whose individual insurer members maintain standards and financial condition reasonably comparable to admitted insurers, that submits to this state's authority to examine its books and records and bears the expense of examina-

tion, and that has an aggregate policyholder's surplus of ten billion dollars (\$10,000,000,000), the commissioner shall grant accreditation to that group. The trust shall be in an amount equal to the group's several liabilities attributable to business ceded by United States ceding insurers to any member of the group pursuant to reinsurance contracts issued in the name of that group, plus the group shall maintain a joint trusted surplus of which one hundred million dollars (\$100,000,000) shall be deposited and maintained with a qualified United States financial institution, and shall be held jointly for the exclusive benefit of United States ceding insurers of any member of the group as additional security for any of those liabilities, and each member of the group shall make available to the commissioner an annual certification of the member's solvency by the member's domiciliary regulator and its independent public accountant. The group of incorporated insurers shall file with the commissioner a certified copy of the trust agreement. Each member insurer or reinsurer shall also submit to this state's authority to examine its books and records and bears the expense of examination. The commissioner shall have the authority to require additional amounts to be held in the trust as a condition for initial or continued accreditation if the commissioner determines that these additional amounts are required for the protection of ceding insurers.

(2) The group and, if the commissioner requests, any member of the group, shall report annually to the commissioner information substantially the same as that required to be reported on the National Association of Insurance Commissioners Annual Statement form by licensed insurers to enable the commissioner to determine the sufficiency of the trust fund.

(3) The trust described in paragraph (1) shall be established in a form approved by the commissioner. The trust shall remain in effect for as long as the assum-

ing insurer has outstanding obligations due under the reinsurance agreements subject to the trust. The assuming insurer or its legal successor shall not withdraw its funds from the trust without notice to the commissioner and the ceding insurer. The investments of the trust shall be limited to "general investments" and "excess investments" that would qualify as authorized investments for a California insurer.

(4) No later than February 28 of each year the trustees shall report to the commissioner in writing setting forth the balance of the trust and listing the trust's investments at the preceding year end.

(5) For purposes of this subdivision, "qualified United States financial institution" means an institution that is (A) a member of the Federal Reserve System and of financial standing satisfactory to the commissioner, (B) a California state chartered bank that is insured by the Bank Insurance Fund of the Federal Deposit Insurance Corporation and meets the conditions established by the commissioner, or (C) a United States office of a foreign banking corporation that is (i) licensed under the laws of the United States or any state thereof, (ii) regulated, supervised, and examined by an agency of the United States or a state agency having regulatory authority with respect to banks and trust companies, (iii) designated by the Securities Valuation Office of the National Association of Insurance Commissioners as meeting its credit standards for issuing or confirming letters of credit, and (iv) of a financial standing that is satisfactory to the commissioner.

(6) For purposes of this section, the terms "deposits" and "funds" include securities authorized as general investments by Article 3 (commencing with Section 1170) of Chapter 2, but not to exceed current market value.

(7) For purposes of this subdivision, "group of incorporated insurers" means an incorporated association of

individual incorporated assuming insurers wherein each member insured underwrites solely for its own account.

(8) "Accreditation" means the issuance of a certificate of recognition as an accredited reinsurer by the commissioner to an assuming insurer not authorized to do any insurance business in this state but which (A) presents satisfactory evidence to the commissioner that it meets the applicable standards of solvency required in this state and (B) is in compliance with the conditions prescribed by regulation under which a ceding insurer may be allowed credit for reinsurance recoverable from an insurer not authorized in this state.

(9) The group of incorporated insurers shall annually file a certified copy of this annual report by the trustee.

The commissioner shall recoup administrative cost pursuant to paragraph (1) of subdivision (a) of Section 12921.6.

§ 922.6. Deposits and funds withheld under reinsurance treaties

Deposits and funds withheld under reinsurance treaties shall be reported on the asset side of the financial statement of the ceding insurer, separately from other assets, supported by a detailed schedule describing the deposits or securities in which the withheld funds are invested, and such deposits and securities shall be valued in the same manner as if they were assets of an admitted insurer. Such schedule need not allocate such deposits or securities to the accounts of specific reinsurers or reinsurances.

§ 922.7. Contract cancellable by reinsurer

Where, under the terms of a reinsurance contract, the reinsurer is entitled to cancel such contract without the consent of the ceding insurer on less than 90 days notice,

without providing for a runoff of the reinsurance in force at the date of cancellation, credit for commission shall be allowed on the financial statement of the ceding insurer only as and to the extent that such commission is actually earned. In the case of a reinsurance contract requiring 90 or more days notice of cancellation and involving reinsurance of more than 20 percent of the ceding insurer's gross unearned premiums before any deduction for such reinsurance, the ceding insurer, within 30 days after receiving notice of cancellation, shall notify the commissioner of the fact of cancellation and the estimated amount of gross unearned premiums and return commissions involved.

§ 922.8. Losses recoverable from admitted reinsurer; allowance as assets

Losses or portions thereof paid by the ceding insurer which are recoverable from an admitted reinsurer may be allowed as assets of such ceding insurer. Losses or portions thereof paid by the ceding insurer which are recoverable from a nonadmitted reinsurer may be allowed as assets of such ceding insurer for 90 days after the payment of such losses by the ceding insurer, or for periods preceding specified settlement dates, to the extent that the ceding insurer holds the funds of or deposits made by the reinsurer or there has been a deposit in trust, conforming to the requirements of Section 922.5. With respect to reinsurance in nonadmitted reinsurers, the commissioner may disallow such assets in Sections 922.4 and 922.5.

§ 923. Annual statement forms; completion

The commissioner shall require every insurer which is required to file an annual statement to use the annual statement blanks and instructions thereto adopted by the National Association of Insurance Commissioners. The statements shall be completed in conformity with the

Accounting Practices and Procedures Manual adopted by the National Association of Insurance Commissioners, to the extent that the practices and procedures contained in the manual do not conflict with any other provision of this code. The commissioner may make changes from time to time in the form of the statements and reports as seem to him or her best adapted to elicit from the insurers a true exhibit of their condition. The commissioner shall notify each insurer of any changes from the National Association of Insurance Commissioners' annual statement blanks which the commissioner has determined pursuant to this section to be appropriate.

§ 923.5. Reserves; maintenance; computation; regulations; report of information

Each insurer transacting business in this state shall at all times maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses and claims for which the insurer may be liable, and to provide for the expense of adjustment or settlement of losses and claims.

The reserves shall be computed in accordance with regulations made from time to time by the commissioner. The promulgation of the regulations by the commissioner, or any changes thereto or amendments thereof, shall be in accordance with the procedure provided in Chapter 3.5 (commencing with Section 1340) of Part 1 of Division 3 of Title 2 of the Government Code. The commissioner shall make the regulations upon reasonable consideration of the ascertained experience and the character of such kinds of business for the purpose of adequately protecting the insured and securing the solvency of the insurer.

With respect to liability, common carrier liability, and compensation insurance, the regulations shall be consistent with Section 11558.

The commissioner may prescribe the manner and form of reporting pertinent information concerning the reserves provided for in this section.

This section shall not apply to life insurance, title insurance, disability insurance, mortgage insurance, or mortgage guaranty insurance.

§ 925. Supplemental accounting, financial, and actuarial information; examination and opinion

Upon request of the commissioner, and at intervals as prescribed by him or her, any insurer that appears to the commissioner to require immediate regulatory attention shall provide to the commissioner supplemental accounting, financial, and actuarial information. The commissioner may request that an insurer select and retain an independent certified public accountant, certified public accountant corporation, an actuary corporation, or an independent actuary satisfactory to the commissioner, if that person has not already been retained by the insurer, whenever the information supplied or likely to be supplied is not satisfactory or acceptable to the commissioner, or, whenever the person who would be responsible for that preparation of that information has previously provided information that was not satisfactory or acceptable to the commissioner. The commissioner may select or retain an independent certified public accountant, a certified public accountant corporation, an actuary corporation, or an independent actuary, if the insurer does not within a reasonable time make the selection as requested by the commissioner. If the information is prepared by an independent certified public accountant or independent actuary, or other independent professional financial corporation or person, the corporation or person shall examine and render an opinion upon that supplemental information.

§ 925.2. Subject matter and form of reporting supplemental information; subject matter of opinions

The commissioner may prescribe the subject matter and form of reporting supplemental information and the subject matter of opinions.

§ 925.4. Powers of commissioner

Nothing contained herein shall be deemed in any manner to limit, restrict or abridge the powers of the commissioner to examine insurers, to inquire into their financial condition or to obtain supplemental information in accordance with any other provision of this code.

ARTICLE 14. PROCEEDINGS IN CASES OF INSOLVENCY AND DELINQUENCY

§ 1010. Scope of article

The provisions of this article shall apply to all persons subject to examination by the commissioner, or purporting to do insurance business in this State, or in the process of organization with intent to do such business therein, or from whom the commissioner's certificate of authority is required for the transaction of business, or whose certificate of authority is revoked or suspended.

§ 1011. Court order vesting title of assets in commissioner; grounds

The superior court of the county in which is located the principal office of such person in this state shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order vesting title to all of the assets of such person, wheresoever situated, in the commissioner or his successor in office, in his official capacity as such, and direct the commissioner forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the

commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants, and employees from the transaction of its business or disposition of its property until the further order of said court:

(a) That such person has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the commissioner or his deputy or examiner.

(b) That such person has neglected or refused to observe an order of the commissioner to make good within the time prescribed by law any deficiency in its capital if it is a stock corporation, or in its reserve if it is a mutual insurer.

(c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person.

(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or creditors, or to the public.

(e) That such person has violated its charter or any law of the state.

(f) That any officer of such person refuses to be examined under oath, touching its affairs.

(g) That any officer or attorney in fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person.

(h) That a domestic insurer does not comply with the requirements for the issuance to it of a certificate of authority, or that its certificate of authority has been revoked; or

(i) That the last report of examination of any person to whom the provisions of this article apply shows such person to be insolvent within the meaning of Article 13 (commencing with Section 980), Chapter 1, Part 2, Division 1; or if a reciprocal or interinsurance exchange, within the applicable provisions of Section 1370.2, 1370.4, 1371, or 1372; or if a life insurer, within the applicable provisions of Sections 10510 and 10511.

§ 1011.5. Consent to transfer; application; fee

The consent described in Section 1011(c) shall be obtained by filing an application with the commissioner in a form to be prescribed by him accompanied by such additional information concerning the insurer, its condition and affairs as the commissioner requires.

A fee of two thousand six hundred fifty-five dollars (\$2,655) shall be paid to the commissioner for the filing of the application.

§ 1012. Duration of order; hearing

Said order shall continue in force and effect until, on the application either of the commissioner or of such person, it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business.

§ 1013. Commissioner's power of summary seizure; grounds

Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately,

the commissioner, without notice and before applying to the court for any order, forthwith shall take possession of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transaction of its business, and retain possession subject to the order of the court. Any person having possession of and refusing to deliver any of the books, records or assets of a person against whom a seizure order has been issued by the commissioner, shall be guilty of a misdemeanor and punishable by fine not exceeding one thousand dollars or imprisonment not exceeding one year, or both such fine and imprisonment.

§ 1014. Assistance of peace officers

Whenever the commissioner makes any seizure as provided in section 1013, it shall, on the demand of the commissioner, be the duty of the sheriff of any county of this State, and of the police department of any municipal corporation therein, to furnish him with such deputies, patrolmen or officers as may be necessary to assist the commissioner in making and enforcing any such seizure.

§ 1015. Procedure following summary seizure

Immediately after such seizure, the commissioner shall institute a proceeding as provided for in section 1011 and thereafter shall proceed in accordance with the provisions of this article.

§ 1016. Application for liquidation order; hearing; court order

If at any time after the issuance of an order under section 1011, or if at the time of instituting any proceeding under this article, it shall appear to the commissioner that it would be futile to proceed as conservator with the conduct of the business of such person, he may apply to the court for an order to liquidate and wind up the

business of said person. Upon a full hearing of such application, the court may make an order directing the winding up and liquidation of the business of such person by the commissioner, as liquidator, for the purpose of carrying out the order to liquidate and wind up the business of such person.

§ 1017. Order dissolving corporation

In his application for an order for the liquidation of a domestic corporation, or at any time thereafter, the commissioner may apply for, and the court shall make, an order dissolving such corporation.

§ 1018. Recordation of court orders

The recording in the office of a county recorder of any county in the State of an order entered pursuant to section 1011, 1016 or 1017 shall impart the same notice that would be imparted by the recordation of a deed, bill of sale or other evidence of title duly executed by such person.

§ 1019. Date of vesting of claimant's rights

Upon the issuance of an order of liquidation under section 1016, the rights and liabilities of any such person and of creditors, policyholders, shareholders and members, and all other persons interested in its assets, including the State of California, shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order in the office of the clerk of the county wherein the application was made.

§ 1020. Injunctions; other court orders

Upon the issuance of an order either under Section 1011 or 1016, or at any time thereafter, the court shall issue such other injunctions or orders as may be deemed necessary to prevent any or all of the following occurrences:

(a) Interference with the commissioner or the proceeding.

(b) Waste of assets of such person.

(c) The institution or prosecution of any actions or proceedings.

(d) The obtaining of preferences, judgments, attachments, or other liens against such person or its assets.

(e) The making of any levy against any such person or its assets.

(f) The sale or deed for nonpayment of taxes or assessments levied by any taxing agency of property:

(1) Owned by such person.

(2) Upon which such person holds an encumbrance.

(3) Upon which such person has prior thereto commenced an action to foreclose any deed of trust or mortgage or has exercised the power of sale under any trust deed or mortgage which sale or foreclosure proceedings have not yet been completed or upon which no trustee's deed or judgment of court or sheriff's certificate of sale has been issued. "Taxing agency" as used in this section has the meaning ascribed to it by Section 121 of the Revenue and Taxation Code. The injunctions or orders authorized by this subdivision may be modified, dissolved or rescinded by the court on motion of the commissioner, the State Controller, the person charged with the collection of taxes or assessments on such property, or any person beneficially interested in the property. The recording in the office of the county recorder of any county in the State of an order or injunction issued pursuant to this section, shall constitute service of such order or injunction upon any taxing agency with respect to property or interests therein located in such county.

(g) Any managing general agent or attorney in fact from withholding from the commissioner any books,

records, accounts, documents or other writing relating to the business of such person; provided, however, that, if by contract or otherwise any of the same are the property of such an agent or attorney, the same shall be returned when no longer necessary to the commissioner or at any time the court after notice and hearing shall so direct.

§ 1021. Notice to claimants

(a) Upon the making of an order to liquidate the business of such person, the commissioner shall cause to be published notice to its policyholders, creditors, shareholders, and all other persons interested in its assets. Such notice shall require claimants to file their claims with the commissioner, together with proper proofs thereof, within six months after the date of first publication of such notice, in the manner specified in this article.

(b) The six-month period specified in subdivision (a) shall not apply to the California Insurance Guarantee Association or the California Life and Health Insurance Guarantee Association provided it files with the commissioner a notice of possible claim within such six-month period and files actual claim or claims within such periods of time as may be permitted by order of court.

§ 1022. Publication of notice

Such notice shall be published in a newspaper of general circulation, published in the county in which the proceeding is pending, not less than once a week for four successive weeks. A copy of the notice, accompanied by an affidavit of due publication, including a statement of the date of first publication, shall be filed with the clerk of the court.

§ 1023. Form and contents of claim

A claim must set forth, under oath, on the form prescribed by the commissioner:

(a) The particulars thereof, and the consideration therefor.

(b) Whether said claim is secured or unsecured, and, if secured, the nature and amount of such security.

(c) The payments, if any, made thereon.

(d) That the sum claimed is justly owing from such person to the claimant.

(e) That there is no offset to the claim.

(f) Such other data or supporting documents as the commissioner requires.

§ 1024. Failure to file claims; life insurance death claims

Unless such claim is filed in the manner and within the time provided in section 1021, it shall not be entitled to filing or allowance, and no action may be maintained thereon. In the liquidation, pursuant to the provisions of this article, of any domestic insurer which has issued policies insuring the lives of persons, the commissioner shall, within thirty days after the last day set for the filing of claims, make a list of the persons who have not filed proofs of claim with him and to whom, according to the books of said insurer, there are amounts owing under such policies, and he shall set opposite the name of each person the amount so owing to such person. Each person whose name shall appear upon said list shall be deemed to have duly filed, prior to the last day set for the filing of claims, a claim for the amount set opposite his name on said list.

§ 1025. Unliquidated claims

Claims founded upon unliquidated or undetermined demands must be filed within the time limit provided in this article for the filing of claims, but claims founded upon such demands shall not share in any distribution to creditors of a person proceeded against under section

1016 until such claims have been definitely determined, proved and allowed. Thereafter, such claims shall share ratably with other claims of the same class in all subsequent distributions.

An unliquidated or undetermined claim or demand within the meaning of this article shall be deemed to be any such claim or demand upon which a right of action has accrued at the date of the order of liquidation and upon which the liability has not been determined or the amount thereof liquidated.

§ 1025.5. Alternative procedures to requiring separate claims

Notwithstanding the provisions of Section 1021 to 1025, inclusive, the commissioner may, in lieu of requiring claimants to file separate claims:

(a) File a claim himself or herself on behalf of all claimants for return premiums.

(b) Permit any assignee of the right of the insured to a return premium by virtue of a valid assignment, as security or otherwise, made prior to an order under Section 1011 or a seizure under Section 1013, whichever is earlier in time in the particular case, to file one claim as assignee on behalf of all insureds having assigned rights to the assignee, which shall set forth such information as may be required under Section 1023.

(c) Permit the California Insurance Guarantee Association under subdivision (b) of Section 1063.4, or the California Life and Health Insurance Guarantee Association under paragraph (1) of subdivision (m) of Section 1067.07 to file one claim, for its association, combining all assigned claims and setting forth the information that the commissioner may require under Section 1023.

§ 1026. Third party liability claims

Whenever any person has a cause of action against an insured and such cause is covered by a liability policy, such person, if the insurer is adjudged insolvent, may file a claim in the liquidation proceeding even if the claim is undetermined or unliquidated.

§ 1026.1. Subrogation to rights of third party claimant

Where a claim arising out of a policy of insurance has been filed by a third party and approved by the liquidator and such claim has subsequently been paid or satisfied, either wholly or in part, by the transfer of anything of value, either voluntarily or by process, from the insured of the person in liquidation to such third party, then upon the filing with the liquidator of proof of the making and value of such transfer, to the extent and in the manner required by the liquidator, the insured shall be subrogated to the rights of the third party claimant to the extent that the claim has been satisfied and discharged, but the rights of the insured shall not exceed the face value of such claim and if the insured has theretofore filed a claim covering the same subject matter, he is entitled to only one recovery.

§ 1027. Allowance of third party liability claims

A claim by a third party founded upon an insurance policy may be allowed by the liquidator without requiring such claim to be reduced to judgment, provided it can be reasonably inferred from the proof presented that the claimant would be able to obtain a judgment upon his cause of action against the insured and that such judgment would represent a liability of the person in liquidation under the policy of insurance upon which such claim is founded.

In the event several claims founded upon one policy or bond are filed, and the aggregate amount of such

claims exceeds the liability limit of said policy or bond, and one or more of such claims is unliquidated and undetermined, then all of such claims shall be deemed unliquidated and undetermined; provided, however that should one or more of said claims become determined and proved within the time provided in this article, the liquidator, upon any distribution to creditors, shall impound the distribution percentage of the face amount of said claim or claims so determined and proved, not exceeding the policy or bond limit, and upon such claim or claims becoming liquidated as to amount, the liquidator shall release to such claimant the distribution percentage of the final liquidated value of such claims out of the funds so impounded.

§ 1028. Default or collusive judgment against insured

A judgment taken by default, or by collusion, against an insured shall not be considered as evidence, in the liquidation proceeding, either of the liability of such insured to such claimant upon such cause of action or of the amount of damages to which such claimant is entitled.

§ 1029. Secured claimant

A claim of a secured claimant shall not be allowed in a sum greater than the excess over the value of the security of the amount for which the claim would be allowable if unsecured, unless the claimant surrenders the security to the liquidator. Upon such surrender the claim may be allowed in the full amount for which it is valued.

§ 1030. Valuation of security

The value of the security to be credited upon such claim shall be determined by an appraiser appointed by the liquidator and approved by the court. Such claimant shall elect to accept the security or to release it to the liquidator.

§ 1030.5. Conditions for payment of final liquidation dividend to lender; insured defined

(a) The liquidator may require, as a condition of payment of the final liquidation dividend to a lender, or his assignee, who has filed a claim for an unearned premium as an assignee of the insured for valuable consideration, that such assignee of the insured shall assign to the liquidator all his right, title, and interest in any unsatisfied debt of the insured to such assignee, pertaining to policies of the insolvent insurer, remaining unpaid after crediting the final liquidation dividend, if the amount of such unsatisfied debt is less than one hundred dollars and one cent (\$100.01).

The liquidator may also require, as condition precedent, the delivery to him of all the documents giving rise to such debt.

The liquidator, in his sole discretion, may determine whether or not it will be feasible to attempt to collect any such assigned debt. If he determines not to pursue collection of any such debt, he shall file a declaration to that effect with the liquidation court and be relieved of any further responsibility in respect to such debt.

(b) As used in this section, "insured" means a natural person who purchased insurance from the insolvent insurer for personal, family, or household purposes.

§ 1030.6. Unearned premiums or commission uncollected by agent

In any proceeding under this article, no agent shall be liable to the liquidator or conservator for unearned premiums uncollected by the agent, or unearned commissions uncollected by the agent, arising from an insolvency of an insurer.

§ 1031. Set-off of claims

In all cases of mutual debts or mutual credits between the person in liquidation under Section 1016 and any other person, such credits and debts shall be set off and the balance only shall be allowed or paid, but no set-off shall be allowed in favor of such other person where any of the following facts exist:

(a) The obligation of the person in liquidation to such other person does not entitle such other person claiming such set-off to share as a claimant in the assets of such person in liquidation.

(b) The obligation of the person in liquidation to such other person was purchased by, or transferred to, such other person.

(c) The obligation of such other person to the person in liquidation is to pay an assessment levied against such other person or to pay a balance upon a subscription for shares of the capital stock of the person in liquidation.

§ 1032. Rejection of claim; notice; application for show-cause order

When a claim is rejected by the commissioner, written notice of rejection shall be given by mail, addressed to the claimant at the address set forth in his claim. Within 30 days after the mailing of the notice the claimant may apply to the court in which the liquidation proceeding is pending for an order to show cause why the claim should not be allowed.

§ 1033. Priorities in allowance; satisfaction of claims under separate account policy, contract, or agreement

(a) Claims allowed in a proceeding under this article shall be given preference in the following order:

(1) Expense of administration.

(2) Unpaid charges due under the provisions of Section 736.

(3) Taxes due to the State of California.

(4) Claims having preference by the laws of the United States and by laws of this state.

(5) All claims of the California Insurance Guarantee Association or the California Life and Health Insurance Guaranty Association, and associations or entities performing a similar function in other states, together with claims for refund of unearned premiums and all claims of policyholders of an insolvent insurer that are not covered claims.

Claims excluded by paragraphs (3) (except claims for refund of unearned premiums), (4), (5), (7), and (8) of subdivision (c) of Section 1063.1, subdivisions (h) and (i) of Section 1063.2, and paragraph (2) of subdivision (b) of Section 1067.02, shall be excluded from this priority.

(6) All other claims.

(b)(1) Every claim allowed under a separate account policy, contract, or agreement providing, in effect, that the assets allocated to the separate account shall not be chargeable with liabilities arising out of any other business of the insurer, shall be satisfied out of the assets properly allocated to and maintained in the separate account, excluding amounts allocated or transferred to the separate account by the insurer pursuant to subdivision (b) of Section 10506, equal to the reserves maintained in the separate account for the policies, contracts, or agreements. No liabilities of the insurer arising out of any other business of the insurer shall be satisfied from assets properly allocated to and maintained in a separate account except (1) from amounts allocated or transferred to the separate account pursuant to subdivision (b) of Section 10506 and (2) from any assets allocated to the separate account which exceed the reserves under the

separate account policies, contracts, or agreements. For the purposes of this subdivision, "separate account policies, contracts, or agreements" shall mean any policies, contracts, or agreements that provide for separate accounts as contemplated by Section 10506, 10506.3, 10506.4, or 10541. Any valid and allowed claim against the general account for contractual benefits under an obligation authorized by Section 10506.4 shall be included as a claim within paragraph (5) of subdivision (a).

(2) Notwithstanding any other provision of law, to the extent that any assets of a life insurer, other than those assets properly allocated to, and maintained in, a separate account, have been used to fund or pay any expenses, taxes, or policyholder benefits that are attributable to a separate account policy, contract, or agreement which should have been paid by a separate account prior to the commencement of delinquency proceedings, then upon the commencement of delinquency proceedings, the separate accounts which benefited from this payment or funding shall first be used to repay or reimburse the company's general assets or account for any unreimbursed net sums due at the commencement of delinquency proceedings prior to the application of the separate account assets to the satisfaction of liabilities of the corresponding separate account policies, contracts, and agreements.

(c) Upon the issuance of an order appointing a conservator or liquidator for any person under the provisions of either Section 1011 or 1016 or both these sections, the lien of taxes due to the State of California imposed by Article 4 (commencing with Section 12491) of Chapter 4 of Part 7 of Division 2 of the Revenue and Taxation Code shall become subordinate to the reasonable administrative expenses of the proceeding under the order.

§ 1034. Voidable transactions

After the issuance of an order of liquidation under Section 1016, any of the following transactions occurring within four months prior to the application for

the order shall be voidable by the commissioner if the transaction has the effect of giving to or enabling any creditor of the person to obtain a preference over any other creditor of the same class, or a greater percentage of his or her debt than any other creditor of the same class:

- (a) A transfer of property of the person.
- (b) The creation of a lien on the property of the person.
- (c) The suffering of a judgment against the person.
- (d) The transfer or other payments by the person pursuant to subdivision (f) of Section 10506 in support of guarantees contemplated by Section 10506.4.

§ 1035. Deputy commissioners, clerks and assistants; employment; powers; costs and expenses

In any proceeding under this article, the commissioner shall have the power to appoint and employ under his or her hand and official seal, special deputy commissioners, as his or her agents, and to employ clerks and assistants and to give to each of them those powers that he or she deems necessary. Upon appointing or employing special deputy commissioners, clerks, or assistants, the commissioner shall notify the Chair of the Joint Budget Committee of the Legislature, by letter, of the action. The costs of employing special deputy commissioners, clerks, and assistants appointed to carry out this article, and all expenses of taking possession of, conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and property of that person under this article, shall be fixed by the commissioner, subject to the approval of the court, and shall be paid out of the assets of that person to the department. In the event the property of that person does not contain cash or liquid assets sufficient to defray the cost of the services required to be performed under the terms of this article, the commis-

sioner may at any time or from time to time pay the cost of those services out of the appropriation for the maintenance of the department, but not out of the assets of other estates. Any amounts so paid shall be deemed expense of administration and shall be repaid to the fund out of the first available moneys in the estate.

§ 1035.5. Disbursement of assets; offset of amount disbursed

Notwithstanding the provisions of Article 14 (commencing with Section 1010), with regard only to those insurers subject to this article:

(a) Within 120 days of the issuance of an order directing the winding up and liquidation of the business of an insolvent insurer under Section 1016, the commissioner shall make application to the court for approval of a proposal to disburse the insurer's assets, from time to time as such assets become available, to the California Insurance Guarantee Association, or the California Life and Health Insurance Guarantee Association, and to any entity or person performing a similar function in another state.

(b) The proposal shall at least include the following provisions for:

(1) Reserving amounts for the payment of expenses of administration and the payment of claims of secured creditors (to the extent of the value of the security held) and claims falling within the priorities established in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 1033.

(2) Disbursement of the assets marshaled to date and subsequent disbursements of assets as they become available.

(3) Equitable allocation of disbursements to each of the associations entitled thereto.

(4) The securing by the commissioner from each of the associations entitled to disbursements pursuant to this section of an agreement to return to the commissioner such assets previously disbursed as may be required to pay claims of secured creditors and claims falling within the priorities established in paragraphs (1) to (5), inclusive, of subdivision (a) of Section 1033 in accordance with the priorities. No bond shall be required of any association.

(5) A full report to be made by the association to the commissioner accounting for all assets so disbursed to the association, all disbursements made therefrom, any interest earned by the association on the assets, and any other matter as the court may direct.

(c) The commissioner's proposal shall provide for disbursements to the associations in amounts estimated at least equal to the claim payments made or to be made by the associations for which such associations could assert a claim against the commissioner, and shall further provide that if the assets available for disbursement from time to time do not equal or exceed the amount of the claim payments made or to be made by the associations, then disbursements shall be in the amount of available assets. The reserves of the insolvent insurer on the date of the order of liquidation shall be used for purposes of determining the pro rata allocation of funds among eligible associations.

(d) The commissioner shall offset the amount disbursed to any entity or person performing a function in any other state similar to that function performed by the California Insurance Guarantee Association, or the California Life and Health Insurance Guarantee Association, by the amount of any statutory deposit, premiums, or any other asset of the insolvent insurer held in that state.

(e) Notice of such application shall be given to the associations in and to the commissioners of insurance

of each of the states. Any such notice shall be deemed to have been given when deposited in the United States certified mails, first-class postage prepaid, at least 30 days prior to submission of such application to the court. Action on the application may be taken by the court provided the above required notice has been given and provided further that the commissioner's proposal complies with paragraphs (1) and (4) of subdivision (b).

§ 1036. Employment of legal counsel; compensation

The Attorney General shall have the power to appoint and employ such legal counsel as may by him be deemed necessary to assist the commissioner in the performance of his duties under this article. The compensation of such legal counsel shall be fixed by the Attorney General, subject to the approval of the court, and shall be paid out of the assets of the person against whom the commissioner has proceeded under this article.

§ 1037. Powers of commissioner as conservator or liquidator

Upon taking possession of the property and business of any person in any proceeding under this article, the commissioner, exclusively and except as otherwise expressly provided by this article, either as conservator or liquidator:

(a) **[Conservation of assets; conduct of business.]** Shall have authority to collect all moneys due that person, and to do such other acts as are necessary or expedient to collect, conserve, or protect its assets, property, and business, and to carry on and conduct the business and affairs of that person or so much thereof as to him or her may seem appropriate.

(b) **[Collection of debts; sale, compromise, and assignment.]** Shall collect all debts due and claims belonging to that person, and shall have the authority to sell, com-

pound, compromise, or assign, for the purpose of collection upon such terms and conditions as the commissioner deems best, any bad or doubtful debts.

(c) **[Compounding, compromising, and settling claims.]** Shall have authority to compound, compromise or in any other manner negotiate settlements of claims against that person upon such terms and conditions as the commissioner shall deem to be most advantageous to the estate of the person being administered or liquidated or otherwise dealt with under this article.

(d) **[Acquisition and disposition of property.]** Shall have authority without notice, to acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with, any real or personal property of that person at its reasonable market value, or, in cases other than acquisition, sale, or transfer on the basis of reasonable market value, upon such terms and conditions as the commissioner may deem proper. However, no transaction involving real or personal property shall be made where the market value of the property involved exceeds the sum of twenty thousand dollars (\$20,000) without first obtaining permission of the court, and then only in accordance with any terms that court may prescribe.

(e) **[Transfer of stock to voting trust.]** Shall have authority to transfer to a trustee or trustees, under a voting trust agreement, the stock of an insurer heretofore or hereafter issued to the commissioner as conservator or as liquidator in connection with a rehabilitation or reinsurance agreement, or any other proceeding under this article. This voting trust agreement shall confer upon the trustee or trustees the right to vote or otherwise represent that stock, and shall not be irrevocable for a period of more than 21 years.

(f) **[Lawsuits, execution of instruments.]** May, for the purpose of executing and performing any of the pow-

ers and authority conferred upon the commissioner under this article, in the name of the person affected by the proceeding or in the commissioner's own name, prosecute and defend any and all suits and other legal proceedings, and execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate any sale of any real and personal property or other transaction in connection with the administration, liquidation, or other disposition of the assets of the person affected by that proceeding; and any deed or other instrument executed pursuant to the authority hereby given shall be valid and effectual for all purposes as though it had been executed by the person affected by any proceeding under this article or by its officers pursuant to the direction of its governing board or authority. In cases where any real property sold by the commissioner under this article is located in a county other than the county wherein the proceeding is pending, the commissioner shall cause a certified copy of the order of his or her appointment, or order authorizing or ratifying the sale, to be filed in the office of the county recorder of the county in which that property is located.

(g) **[Investments.]** Shall have authority to invest and reinvest, in such manner as the commissioner may deem suitable for the best interests of the creditors of that person, such portions of the funds and assets of that person in his or her possession as do not exceed the amount of the reserves required by law to be maintained by that person as reserves for life insurance policies, annuity contracts, supplementary agreements incidental to the business, and reserves for noncancellable disability policies, and which funds and assets are not immediately distributable to creditors. However, no investment or reinvestment shall be made which exceeds the sum of one hundred thousand dollars (\$100,000) without first obtaining permission of the court, and then only in accordance with any terms that court may prescribe. That permission shall not

be required for any investment or reinvestment of those funds or assets in funds administered by the Treasurer.

[General powers.] The enumeration, in this article, of the duties, powers and authority of the commissioner in proceedings under this article shall not be construed as a limitation upon the commissioner, nor shall it exclude in any manner his or her right to perform and to do such other acts not herein specifically enumerated, or otherwise provided for, which the commissioner may deem necessary or expedient for the accomplishment or in aid of the purpose of such proceedings.

§ 1038. Service of application for conservation or liquidation

Any application under section 1011 or 1016 shall be served upon the person named in such application in the manner prescribed by law for personal service of summons or as provided by section 1039.

§ 1039. Substituted service

In lieu of the service required by section 1038, service may, upon application to said court, be made in such manner as the court directs whenever it is satisfactorily shown by affidavit (a) in the case of a corporation, that the officers of the corporation upon whom service is required to be made as above provided, have departed from the State or keep themselves concealed therein with intent to avoid the service, or, (b) in the case of a Lloyd's association or interinsurance exchange, that the individual attorney in fact or the officers of the corporate attorney in fact can not be served because of such departure or concealment, or, (c) in the case of a natural person, that the natural person upon whom service is required to be made as above provided, has departed from the State or keeps himself concealed therein with intent to avoid the service.

§ 1040. Removal of insurer's principal office; change of venue

At any time after an order is made under section 1011 or 1016, the commissioner may remove the principal office of the person proceeded against to the City and County of San Francisco or to the city of Los Angeles. In event of such removal, the court wherein the proceeding was commenced shall, upon the application of the commissioner, direct its clerk to transmit all of the papers filed therein with such clerk to the clerk of the City and County of San Francisco or of the county of Los Angeles as the case may require. The proceeding shall thereafter be conducted in the same manner as though it had been commenced in the county to which it had been transferred.

§ 1041. Custody of money; deposit in bank; investment

The commissioner shall be the custodian of all moneys collected by him or her or coming into his or her possession in the course of any proceeding under this article, but the commissioner may deposit those moneys, or any part thereof, without court approval in a bank which is a member of the Federal Deposit Insurance Corporation (FDIC), so long as the total deposit did not exceed those federal insurance limits; in a centralized State Treasury system bank account; or in funds administered by the Treasurer.

Provided further, any money which is deposited by the commissioner pursuant to this section, which the commissioner determines is available for investment, may be invested or reinvested by the Treasurer in any of the securities which are described in Article 1 (commencing with Section 16430) of Chapter 3 of Part 2 of Division 4 of Title 2 of the Government Code, or placed in a bank as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2 of the Government Code, and handled in the same manner as

money in the State Treasury. Any increment which is received from that investment or reinvestment or deposit shall be remitted to the commissioner for allocation, upon a proper and equitable basis, to each estate participating in the investment, reinvestment, or deposit and deposited and disbursed as provided in Section 1037. The Treasurer may deduct from that remittance an amount equal to the reasonable costs incurred in carrying out this section or may bill the commissioner for those costs and the commissioner shall pay those costs from money which is collected pursuant to this chapter.

§ 1042. Subpoena powers; examination of witnesses under oath

The commissioner and a special deputy commissioner appointed pursuant to section 1035 shall have the power to subpoena witnesses and examine them under oath upon any subject relating to the affairs and business of any person affected by proceedings under this article. The penalties provided in Chapter 2, Title 3, Part 4 of the Code of Civil Procedure¹ shall apply to any witness who fails or refuses to appear in accordance with such subpoena, or to testify in connection therewith.

§ 1056.5. Disposition of unclaimed funds

Whenever money or other property is payable to any claimant out of the assets of any person under the provisions of Sections 1021 to 1033, but such person cannot be located or for any other reason the payment of such money or other property to such person cannot be made, although assets are available for such payment, such money or other property shall be deposited in the State Treasury by the commissioner. Such deposits shall be deemed to have been received under the provisions of Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure, and shall be sub-

¹ Code of Civil Procedure § 1985 et seq.

ject to claim or other disposition as provided in said Chapter 7 (commencing with Section 1500) of Title 10. The commissioner may pay over the money or other property held by him to the persons respectively entitled thereto at any time prior to such deposit, upon being furnished satisfactory evidence of their right to the same.

§ 1057. Status of commissioner as trustee

In all proceedings under this article, the commissioner shall be deemed to be a trustee for the benefit of all creditors and other persons interested in the estate of the person against whom the proceedings are pending.

§ 1058. Jurisdiction of court

In any proceeding pending under the provisions of this article, the court in which such proceeding is pending shall have jurisdiction to hear and determine, in such proceeding, all actions or proceedings then pending or thereafter instituted by or against the person affected by a proceeding under this article.

§ 1059. Status of commissioner as public officer

The commissioner, in the performance of any of his duties under this article, shall be deemed to be a public officer acting in his official capacity on behalf of the State, and the provisions of Chapter 2, Division 7, Title 1 of the Government Code¹ shall apply to him.

§ 1060. Report of Governor

The commissioner shall transmit to the Governor an annual report showing:

(a) The names of the persons proceeded against under this article.

(b) Whether such persons have resumed business or have been liquidated or have been mutualized.

¹ Government Code § 6100 et seq.

(c) Such other facts as will acquaint the Governor, the policyholders, creditors, shareholders and the public with his proceedings under this article.

§ 1061. Annual examination of estates; report to court; expense of examination

In verification of the matters set forth in Section 1060 of this code, the Department of Finance shall, at least every two years or more often if requested by the commissioner, examine the commissioner's books and accounts relating to all proceedings under this article and Article 8 (commencing with Section 12550), Chapter 2, Part 6, Division 2 of this code, and shall file a report of each such examination with the court in which the respective proceeding is pending and shall furnish the commissioner a certified copy of each such report. The expense of examining the books and accounts of the commissioner as conservator or liquidator under this article or under Article 8 (commencing with Section 12550), Chapter 2, Part 6 of Division 2 of this code shall be paid out of the support appropriation for the Department of Insurance current at the date of billing for such expense and shall, upon order of the court or courts before which the proceedings under said articles are pending, be ratably reimbursed to such appropriation out of the assets of the estates administered by the commissioner as conservator or liquidator under this article or under Article 8 (commencing with Section 12550), Chapter 2, Part 6 of Division 2 of this code.

§ 1062. Assessment liability; termination; levy

In the event of the entry of an order under Section 1011 or 1016 of this article affecting any person having members, subscribers or policyholders, hereinafter referred to as "members" who are liable for assessment by law or by the provisions of their policies or contracts, and in which the termination of the policy or contract does not

relieve the member from such liability, where the commissioner in his discretion decides that an assessment would be in order, the liability of such members shall be determined, and the assessment therefor levied in the following manner:

1. **[Report.]** Within one year from the date of the entry of the order under the provisions of Section 1011 or 1016 of this article, the commissioner shall make a report to the court setting forth: (a) the reasonable value of the assets of such person; (b) its probable liabilities, including reasonable costs of liquidation; and (c) the probable necessary assessment, if any, to pay all claims in full.

2. **[Calculation.]** Upon the basis of such report, including any amendments thereof, the court shall determine the basis for calculating the liability of each member, subscriber or policyholder and shall order the commissioner to determine the amount of liability of each of the members.

3. **[Notice of amount.]** Thereafter the commissioner shall give notice to each member, subscriber or policyholder of the amount of his liability by inclosing notice thereof in a sealed envelope, addressed and mailed, postage prepaid, to each member, subscriber or policyholder at his last known address as the same appears upon the books of the insurer.

4. **[Report of delinquencies; court order.]** Not less than 20 days after the mailing of said notice, as provided in paragraph 3 of this section, the commissioner shall report to the court the names of the members, subscribers or policyholders who have failed to pay their assessment in accordance with said notice, whereupon the court shall issue an order directing each of said members, subscribers or policyholders to appear in said court and show cause in the proceedings pending against such person, why he should not be held liable to pay such assessment, and why the commissioner should not have judgment therefor.

5. **[Notice of court order.]** The commissioner shall cause a notice of such order setting forth a brief summary of the contents thereof: (a) to be published in such manner as shall be directed by the court; and (b) to be inclosed in a sealed envelope, addressed and mailed by registered mail with return receipt requested, postage prepaid, to each of said members whose liability for assessment remains unpaid, at his last known address, at least 20 days before the return day of such order to show cause.

6. **[Hearing, final order.]** On the return day of such order to show cause, (a) if such member shall not appear and serve verified objections on the commissioner, the court shall make an order adjudicating that such member is liable for the amount of such assessment, and that the commissioner may have a judgment against such member therefor; (b) if such member shall appear and serve verified objections upon the commissioner, there shall be a full hearing before the court, and if the court affirms his liability to pay the whole or some part of said assessment, the commissioner may have judgment therefor.

7. **[Judgment.]** A judgment upon any such order, shall have the same force and effect, and may be entered and may be appealed from as if it were a judgment in an original action brought in the court in which the proceeding is pending.

ARTICLE 14.2. CALIFORNIA INSURANCE GUARANTEE ASSOCIATION

§ 1063. Establishment; powers and duties

(a) Within 60 days after the original effective date of this article, all insurers, including reciprocal insurers, admitted to transact insurance in this state of any or all of the following classes only in accordance with the provisions of Chapter 1 (commencing with Section 100) of Part 1 of this division: fire (see Section 102), marine

(see Section 103), plate glass (see Section 107), liability (see Section 108, workers' compensation (see Section 109), common carrier liability (see Section 110), boiler and machinery (see Section 111), burglary (see Section 112), sprinkler (see Section 114), team and vehicle (see Section 115), automobile (see Section 116), aircraft (see Section 118), and miscellaneous (see Section 120), shall establish the California Insurance Guarantee Association (the association; provided, however, this article shall not apply to the following classes or kinds of insurance: life and annuity (see Section 101), title (see Section 104), fidelity or surety including fidelity or surety bonds, or any other bonding obligations (see Section 105), disability or health (see Section 106), credit (see Section 113), mortgage (see Section 117), mortgage guaranty, insolvency or legal (see Section 119), financial guaranty or other forms of insurance offering protection against investment risks (see Section 124), the ocean marine portion of any marine insurance or ocean marine coverage under any insurance policy including the following: the Jones Act (46 U.S.C. Sec. 688), the Longshore and Harbor Workers' Compensation Act (33 U.S.C. Sec. 901 et seq.), or any other similar federal statutory enactment, or any endorsement or policy affording protection and indemnity coverage, or reinsurance as defined in Section 620, or fraternal fire insurance written by associations organized and operating under Sections 9080 to 9103, inclusive. Any insurer admitted to transact only those classes or kinds of insurance excluded from this article shall not be a member insurer of the association. Each such insurer, including the State Compensation Insurance Fund, as a condition of its authority to transact insurance in this state, shall participate in the association whether established voluntarily or by order of the commissioner after the elapse of 60 days following the original effective date of this article in accordance with rules to be established as provided in this article. It shall be the purpose of such association to provide for each member insurer insolvency insurance as defined in Section 119.5.

(b) The association shall be managed by a board of governors, composed of nine member insurers, each of which shall be appointed by the commissioner to serve initially for terms of one, two, or three years and thereafter for three-year terms so that three terms shall expire each year on December 31, and shall continue in office until his or her successor shall be appointed and qualified. At least five members of the board shall be domestic insurers. At least three such members shall be stock insurers, and at least three shall be nonstock insurers. The nine members shall be representative, as nearly as possible, of the classes of insurance and of the kinds of insurers covered by this article. In case of a vacancy for any reason on the board, the commissioner shall appoint a member insurer to fill the unexpired term.

(c) The association shall adopt a plan of operations, and any amendments thereto, not inconsistent with the provisions of this article, necessary to assure the fair, reasonable, and equitable manner of administering the association, and to provide for such other matters as are necessary or advisable to implement the provisions of this article. The plan of operations and any amendments thereto shall be subject to prior written approval by the commissioner. All members of the association shall adhere to the plan of operation.

(d) If for any reason the association fails to adopt a suitable plan of operation within 90 days following the original effective date of this article, or if at any time thereafter the association fails to adopt suitable amendments to the plan of operation, the commissioner shall after hearing adopt and promulgate such reasonable rules as are necessary or advisable to effectuate the provisions of this chapter. Such rules shall continue in force until modified by the commissioner after hearing or superseded by a plan of operation, adopted by the association and approved by the commissioner.

(e) In accordance with its plan of operation, the association may designate one or more of its members as a

servicing facility, but a member may decline such designation. Each servicing facility shall be reimbursed by the association for all reasonable expenses it incurs and for all payments it makes on behalf of the association. Each servicing facility shall have authority to perform any functions of the association that the board of governors lawfully may delegate to it and to do so on behalf of and in the name of the association. The designation of servicing facilities shall be subject to the approval of the commissioner.

(f) The association shall have authority to borrow funds when necessary to effectuate the provisions of this article.

(g) The association, either in its own name or through servicing facilities, may be sued and may use the courts to assert or defend any rights the association may have by virtue of this article as reasonably necessary to fully effectuate the provisions thereof.

§ 1063.1 Definitions

As used in this article:

(a) "Member insurer" means an insurer required to be a member of the association in accordance with the provisions of subdivision (a) of Section 1063, except and to the extent that the insurer is participating in an insolvency program adopted by the United States government.

(b) "Insolvent insurer" means a member insurer against which an order of liquidation or receivership with a finding of insolvency has been entered by a court of competent jurisdiction.

(c)(1) "Covered claims" means the obligations of an insolvent insurer, including the obligation for unearned premiums, (i) imposed by law and within the coverage of an insurance policy of the insolvent insurer; (ii) which were unpaid by the insolvent insurer; (iii) which are presented as a claim to the liquidator in this state or to

the association on or before the last date fixed for the filing of claims in the domiciliary liquidating proceedings; (iv) which were incurred prior to the date coverage under the policy terminated and prior to, on, or within 30 days after the date the liquidator was appointed; (v) for which the assets of the insolvent insurer are insufficient to discharge in full; (vi) in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state; and (vii) in the case of other classes of insurance if the claimant or insured is a resident of this state at the time of the insured occurrence, or the property from which the claim arises is permanently located in this state.

(2) "Covered claims" shall not include any obligations arising from the following:

- (i) Life, annuity, health, or disability insurance.
- (ii) Mortgage guaranty, financial guaranty, or other forms of insurance offering protection against investment risks.
- (iii) Fidelity or surety insurance including fidelity or surety bonds, or any other bonding obligations.
- (iv) Credit insurance.
- (v) Title insurance.
- (vi) Ocean marine insurance or ocean marine coverage under any insurance policy including claims arising from the following: the Jones Act (46 U.S.C.A. Sec. 688),¹ the Longshore and Harbor Workers' Compensation Act (33 U.S.C.A. Sec. 901 et seq.), or any other similar federal statutory enactment, or any endorsement or policy affording protection and indemnity coverage.
- (vii) Any claims servicing agreement or insurance policy providing retroactive insurance of a known loss

¹ See 46 App.U.S.C.A. 688.

or losses, except a special excess workers' compensation policy issued pursuant to paragraph (2) of subdivision (a) of Section 3702.8 of the Labor Code which cover all or any part of workers' compensation liabilities of an employer that was previously issued a certificate of consent to self-insure pursuant to subdivision (b) of Section 3700 of the Labor Code.

(3) "Covered claims" shall not include any obligations of the insolvent insurer arising out of any reinsurance contracts, nor any obligations incurred after the expiration date of the insurance policy or after the insurance policy has been replaced by the insured or canceled at the insured's request, or after the insurance policy has been canceled by the association as provided in this chapter, or after the insurance policy has been canceled by the liquidator, nor any obligations to any state or to the federal government.

(4) "Covered claims" shall not include any obligations to insurers, insurance pools, or underwriting associations, nor their claims for contribution, indemnity, or subrogation, equitable or otherwise, except as otherwise provided in this chapter.

No insurer, insurance pool, or underwriting association may maintain, in its own name or in the name of its insured, any claim or legal action against the insured of the insolvent insurer for contribution, indemnity or by way of subrogation, except insofar as, and to the extent only, that the claim exceeds the policy limits of the insolvent insurer's policy. In those claims or legal actions, the insured of the insolvent insurer shall be entitled to a credit or setoff in the amount of the policy limits of the insolvent insurer's policy, or in the amount of such limits remaining, where those limits have been diminished by the payment of other claims.

(5) "Covered claims," except in cases involving a claim for workers' compensation benefits or for unearned

premiums, shall not include any claim in an amount of one hundred dollars (\$100) or less, nor that portion of any claim which is in excess of any applicable limits provided in the insurance policy issued by the insolvent insurer.

(6) "Covered claims" shall not include that portion of any claim, other than a claim for workers' compensation benefits, which is in excess of five hundred thousand dollars (\$500,000).

(7) "Covered claims" shall not include any amount sought as a return of a premium under any policy providing retroactive insurance of a known loss or losses.

(8) "Covered claims" shall not include any amount awarded as punitive or exemplary damages.

(9) "Covered claims" shall not include (i) any claim to the extent it is covered by any other insurance of a class covered by the provisions of this article available to the claimant or insured nor (ii) any claim by any person other than the original claimant under the insurance policy in his or her own name, his or her assignee as the person entitled thereto under a premium finance agreement as defined in Section 673 and entered into prior to insolvency, his or her executor, administrator, guardian or other personal representative or trustee in bankruptcy and shall not include any claim asserted by an assignee or one claiming by right of subrogation, except as otherwise provided in this chapter.

(10) "Covered claims" shall not include any obligations arising out of the issuance of an insurance policy written by the separate division of the State Compensation Insurance Fund pursuant to the provisions of Sections 11802 and 11803.

(11) "Covered claims" shall not include any obligations of the insolvent insurer arising from any policy or contract of insurance issued or renewed prior to the in-

solvent insurer's admission to transact insurance in the State of California.

(12) "Covered claims" shall not include surplus deposits of subscribers as defined in Section 1374.1.

(d) "Admitted to transact insurance in this state" means an insurer possessing a valid certificate of authority issued by the California Department of Insurance.

(e) "Affiliate" means a person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with an insolvent insurer on December 31 of the year next preceding the date the insurer becomes an insolvent insurer.

(f) "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, 10 percent or more of the voting securities of any other person. This presumption may be rebutted by showing that control does not in fact exist.

(g) "Claimant" means any insured making a first party claim or any person instituting a liability claim; provided that no person who is an affiliate of the insolvent insurer may be a claimant.

(h) "Ocean marine insurance" includes marine insurance as defined in Section 103, except for inland marine insurance, as well as any other form of insurance, regardless of the name, label, or marketing designation of the insurance policy, which insures against maritime perils or risks and other related perils or risks, which are usually

insured against by traditional marine insurance such as hull and machinery, marine builders' risks, and marine protection and indemnity. Those perils and risks insured against include, without limitation, loss, damage, or expense or legal liability of the insured arising out of or incident to ownership, operation, chartering, maintenance, use, repair, or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness, or death for loss or damage to the property of the insured or another person.

§ 1063.2. Covered claims; duties; priority of claims

(a) The association shall pay and discharge covered claims and in connection therewith pay for or furnish loss adjustment services and defenses of claimants when required by policy provisions. It may do so either directly by itself or through a servicing facility or through a contract for reinsurance and assumption of liabilities by one or more member insurers or through a contract with the liquidator, upon terms satisfactory to the association and to the liquidation, under which payments on covered claims would be made by the liquidator using funds provided by the association.

(b) The association shall be a party in interest in all proceedings involving a covered claim, and shall have the same rights as the insolvent insurer would have had if not in liquidation, including, but not limited to, the right to: (1) appear, defend, and appeal a claim in a court of competent jurisdiction; (2) receive notice of, investigate, adjust, compromise, settle, and pay a covered claim; and (3) investigate, handle, and deny a non-covered claim. The association shall have no cause of action against the insureds of the insolvent insurer for any sums it has paid out, except as provided by this article.

(c)(1) If damages against uninsured motorists are recoverable by the claimant from his or her own insurer, the applicable limits of the uninsured motorists coverage shall be a credit against a covered claim payable under this article. Any person having a claim that may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured, except that if it is a first-party claim for damage to property with a permanent location, he or she shall seek recovery first from the association of the permanent location of the property, and if it is a workers' compensation claim, he or she shall seek recovery first from the association of the residence of the claimant. Any recovery under this article shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent. A member insurer may recover in subrogation from the association only one-half of any amount paid by such insurer under uninsured motorist coverage for bodily injury or wrongful death (and nothing for a payment for anything else), in those cases where the injured person insured by such an insurer has proceeded under his or her uninsured motorist coverage on the ground that the tortfeasor is uninsured as a result of the insolvency of his or her liability insurer (an insolvent insurer as defined in this article), provided that such member insurer shall waive all rights of subrogation against such tortfeasor. Any amount paid a claimant in excess of the amount authorized by this section may be recovered by action brought by the association.

(2) Any claimant having collision coverage on a loss which is covered by the insolvent company's liability policy shall first proceed against his or her collision carrier. Neither that claimant nor the collision carrier, if it is a member of the association, shall have the right to sue or continue a suit against the insured of the insolvent insurance company for such collision damage.

(d) The association shall have the right to recover from any person who is an affiliate of the insolvent insurer and whose liability obligations to other persons are satisfied in whole or in part by payments made under this article the amount of any covered claim and allocated claims expense paid on behalf of that person pursuant to this article.

(e) Any person having a claim or legal right of recovery under any governmental insurance or guaranty program which is also a covered claim, shall be required to first exhaust his or her right under the program. Any amount payable on a covered claim shall be reduced by the amount of any recovery under the program.

(f) "Covered claims" for unearned premium by lenders under insurance premium finance agreements as defined in Section 673 shall be computed as of the earliest cancellation date of the policy pursuant to Section 673 or subdivision (g) of this section.

(g) "Covered claims" shall not include any judgments against or obligations or liabilities of the insolvent insurer or the commissioner, as liquidator, or otherwise resulting from alleged or proven torts, nor shall any default judgment or stipulated judgment against the insolvent insurer, or against the insured of the insolvent insurer, be binding against the association.

(h) "Covered claims" shall not include any loss adjustment expenses, including adjustment fees and expenses, attorney fees and expenses, court costs, interest, and bond premiums, incurred prior to the appointment of a liquidator.

§ 1063.3. Member insurance insolvencies; detection and prevention; board activity

To aid in the detection and prevention of member insurer insolvencies:

(a) The board may, upon majority vote, make recommendations to the commissioner on matters pertaining to regulation for solvency.

(b) The board may prepare a report on the history and causes of any member insurer insolvency in which the association was obligated to pay covered claims, based on the information available to the association, and submit that report along with any recommendations resulting therefrom to the commissioner.

§ 1063.4. Cooperation; assignment of claims

(a) Insureds entitled to the protection of this article shall cooperate with the association in accordance with their policies in the same manner as they would have been required to cooperate with their insurer if it were not in liquidation and shall be deemed to have assigned to the association any right to make claim against the liquidator for a refund of unearned premium for the period of coverage provided by the association beginning on the date of the order of liquidation to the date of expiration or cancellation.

(b) Any insured or claimant entitled to the benefits of this article who elects to proceed under this article shall be deemed to have assigned to the association his or her rights against the estate of the insolvent insurer.

§ 1063.5. Insolvency; premiums; categories of claim payments; charges or credits; net direct written premiums; failure to pay premiums; interest

Each time an insurer becomes insolvent then, to the extent necessary to secure funds for the association for payment of covered claims of that insolvent insurer and also for payment of reasonable costs of adjusting the claims, the association shall collect premium payments from its member insurers sufficient to discharge its obligations. The association shall allocate its claim payments

and costs, incurred or estimated to be incurred, to one or more of the following categories: (a) workers' compensation claims; (b) homeowners' claims, and automobile claims, which shall include: automobile material damage, automobile liability—(both personal injury and death and property damage), medical payments and uninsured motorist claims; and (c) claims other than workers' compensation, homeowners', and automobile, as above defined. Separate premium payments shall be required for each category. The premium payments for each category shall be used to pay the claims and costs allocated to that category. The rate of premium charged shall be a uniform percentage of net direct written premium in the preceding calendar year applicable to that category. The rate of premium charges to each member in the appropriate categories shall initially be based on the written premium of each insurer as shown in the latest year's annual financial statement on file with the commissioner. The initial premium shall be adjusted by applying the same rate of premium charge as initially used to each insurer's written premium as shown on the annual statement for the second year following the year in which the initial premium charge is made. The difference between the initial premium charge and the adjusted premium charge shall be charged or credited to each member insurer by the association as soon as practical after the filing of the annual statements of the member insurers with the commissioner for the year on which the adjusted premium is based. In the case of an insurer that was a member insurer when the initial premium charge was made and that paid the initial assessment but is no longer a member insurer at the time of the adjusted premium charge by reason of its insolvency or its withdrawal from the state and surrender of its certificate of authority to transact insurance in this state, any credit accruing to that insurer shall be refunded to it by the association. "Net direct written premiums" shall mean the amount of gross premi-

ums, less return premiums, received in that calendar year upon business done in this state, other than premiums received for reinsurance. In cases of a dispute as to the amount of any such net direct written premium between the association and one of its members the written decision of the commissioner shall be final. The premium charged to any member insurer for any of the three categories or a category established by the association shall not be more than 1 percent of the net direct premium written in that category in this state by that member insurer. The association may exempt or defer, in whole or in part, the premium charge of any member insurer, if the premium charge would cause the member insurer's financial statement to reflect an amount of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance. However, during the period of deferment, no dividends shall be paid to shareholders or policyholders by the company whose premium charge was deferred. Deferred premium charges shall be paid when the payment will not reduce capital or surplus below required minimums. These payments shall be credited against future premium charges to those companies receiving larger premium charges by virtue of the deferment. After all covered claims of the insolvent insurer and expenses of administration have been paid, any unused premiums and any reimbursements or claims dividends from the liquidator remaining in any category shall be retained by the association and applied to reduce future premium charges in the appropriate category. However, an insurer which ceases to be a member of the association, other than an insurer that has become insolvent or has withdrawn from the state and has surrendered its certificate of authority following an initial assessment that is entitled to a refund based upon an adjusted assessment as provided above in this section, shall have no right to a refund of any premium previously

remitted to the association. The commissioner may suspend or revoke the certificate of authority to transact business in this state of a member insurer which fails to pay a premium when due and after demand has been made.

Interest at a rate equal to the current federal reserve discount rate plus 2½ percent per annum shall be added to the premium of any member insurer which fails to submit the premium requested by the association within 30 days after such mailing request. However, in no event shall the interest rate exceed the legal maximum.

§ 1063.6. Stay of proceedings against insolvent insurer

Upon petition of the commissioner or the association, the superior court having jurisdiction of an insurer insolvency proceeding or, in the absence thereof, the superior court of the county wherein is located the principal office in this state may stay all proceedings in any court of law of this state to which the insolvent insurer is a party for a period of 60 days from the date a liquidator is appointed in this state or in the state of domicile of the insurer, to permit proper defense of all pending causes of action. Such stay shall be superseded by and when any stay order is entered in the court in this state having jurisdiction of the liquidation or the ancillary liquidation.

§ 1063.7. Liquidators; notice

When a liquidator, domiciliary or ancillary, is appointed in this state for any member insurer, the liquidator shall promptly give notice of his or her appointment and a brief description of the contents of this article and of the nature and functions of the association by prepaid first-class mail, to: (a) all persons known or reasonably expected to have or be interested in claims against the insurer, at the last known address within this state; (b) all insureds of the insurer, at the last known address within this state, accompanied by a notice of the date of

termination of insurance; and (c) the board of governors of the association. Such notice may, but need not be, combined with the notice provided for in Section 1021. In the situations where notice is being provided by an ancillary liquidator, notice is only required to the extent information is available to provide the notice. The ancillary liquidator may also rely on the notice provided by the domiciliary liquidator to satisfy the notice requirements of this section. The liquidator may also require that producers of record of the insurer give prompt written notice of the same information, by first-class mail, to their insureds at the last known address within this state. The liquidator shall also promptly publish such notice in a newspaper of general circulation in the county where the insurer had its principal office in this state not less than once per week, for four weeks, and by publication elsewhere in this state as the court shall direct.

§ 1063.8. Exemptions

Notwithstanding any other provision of law, the association shall be exempt from all license fees, income, franchise, privilege, property, or occupation taxes levied or assessed by this state, any municipality, county, or other political subdivision of this state. The rules of the commissioner promulgated pursuant to this article may exempt the association from: filing an annual statement, maintaining minimum required capital, paying any fees or reimbursements, or meeting any other requirement or doing any other thing required by this code or other laws relating to insurance.

§ 1063.9. Regulation

(a) The operation of the association shall at all times be subject to the regulation of the commissioner. The commissioner, or any deputy or examiner, or any person whom the commissioner shall appoint, shall have the power of visitation and examination into the affairs of

the association and free access to all books, papers, and documents that relate to the business of the association, may summon and qualify witnesses under oath, and may examine officers, agents or employees, or any other person having knowledge of the affairs, transactions, or conditions of the association.

(b) Any member insurer aggrieved by any action or decision of the association may appeal to the commissioner within 30 days after the action or decision of the association and after exhaustion of administrative remedies may seek court relief as provided in Section 12940.

§ 1063.10. Judicial review

All orders or decisions of the commissioner made pursuant to Chapter 1347, Statutes of 1969 (of which this article is a part) and the provisions thereof as amended from time to time, shall be subject to judicial review as provided in Section 12940.

§ 1063.11. Rules, regulations and orders

The commissioner may, upon notice and opportunity for all interested parties to be heard, issue such rules, regulations and orders as may be necessary to carry out the provisions of this article. Such rules and regulations shall be adopted, amended or repealed in accordance with Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code.

§ 1063.12. Liability limits; indemnification against costs and expenses; proration of costs and expenses; application of section

(a) The association, its member insurers, and its officers, directors, agents or employees of the association, or its member insurers, shall under no circumstances be liable for any sum in excess of the amount of covered claims of the insolvent insurer, as defined under subdivision (c) of Section 1063.1 of this article and the

costs of administration and the costs of loss adjustment, investigation and defenses relating to claims thereunder.

(b) Any person or member made a party to any action, suit or proceeding because such person or member served on the board of governors or on a committee or was an officer or employee of the association shall be held harmless and be indemnified by the association against all liability and costs (including the amounts of judgments, settlements, fines or penalties) and expenses incurred in connection with such action, suit or proceeding; provided, however, such indemnification shall not be provided on any matter in which the person or member shall be finally adjudged in any such action, suit or proceeding to have committed a breach of duty involving gross negligence, dishonesty, willful misfeasance or reckless disregard of the responsibilities of his office.

(c) The costs and expenses of such indemnification shall be prorated and paid for by the members in the same manner as provided in the plan of operations for the proration of premiums.

(d) The provisions of this section shall not be construed as creating any right in any third person, and shall be applicable only as between the association and its member insurers and its officers, directors, agents, or employees of the association or its member insurers.

§ 1063.13. Members prohibited from engaging in unlawful trade practice

No member insurer of the association shall engage in the unlawful trade practice defined and condemned in subdivision (g) of Section 790.03.

§ 1063.14. Plan of operation; recoupment of assessments by surcharge on premiums

(a) The plan of operation adopted pursuant to subdivision (c) of Section 1063 shall contain provisions

whereby each member insurer is required to recoup over a reasonable length of time a sum reasonably calculated to recoup the assessments paid by the member insurer under this article by way of a surcharge on premiums charged for insurance policies to which this article applies. Amounts recouped shall not be considered premiums for any other purpose, including the computation of gross premium tax or agents' commission.

(b) The amount of any surcharge shall be separately stated on either a billing or policy declaration sent to an insured. The association shall determine the rate of the surcharge and the collection period for each category and these shall be mandatory for all member insurers of the association who write business in those categories. Member insurers who collect surcharges in excess of premiums paid pursuant to Section 1063.5 for an insolvent insurer shall remit the excess to the association as an additional premium within 30 days after the association has determined the amount of the excess recoupment and given notice to the member of that amount. The excess shall be applied to reduce future premium charges in the appropriate category.

(c) The plan of operation may permit a member insurer to omit collection of the surcharge from its insureds when the expense of collecting the surcharge would exceed the amount of the surcharge. However, nothing in this section shall relieve the member insurer of its obligation to recoup the amount of surcharge otherwise collectible.

§ 1063.145. Surcharge statement; association description and purpose

The statement of the amount of surcharge required to be provided under subdivision (b) of Section 1063.14 shall include a description of, and purpose for, the California Insurance Guarantee Association, as follows:

Companies writing property and casualty insurance business in California are required to participate in the California Insurance Guarantee Association. If a company becomes insolvent the California Insurance Guarantee Association settles unpaid claims and assesses each insurance company for its fair share.

California law requires all companies to surcharge policies to recover these assessments. If your policy is surcharged, "CA Surcharge" with an amount will be displayed on your premium notice."¹

§ 1063.15. Workers' compensation matters; time periods applicable to association

In any workers' compensation matter the association shall have the same period of time within which to act or to exercise a right as is accorded to the insurer by the Labor Code, and those time periods shall be tolled against the association until 45 days after the appointment of a domiciliary or receiver.

§ 1064.1. Definitions

For the purposes of this act:

(a) "Insurer" means any person subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization, or conservation by the commissioner or the equivalent insurance supervisory official of another state.

(b) "Delinquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving that insurer.

(c) "Foreign country" means territory not in any state.

(d) "Domiciliary state" means the state in which an insurer is incorporated or organized, or, in the case of an insurer incorporated or organized in a foreign coun-

¹ So in chaptered copy.

try, the state in which the insurer, having become authorized to do business in the state, has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders or policyholders and creditors in the United States; and any such insurer is deemed to be domiciled in such state.

(e) "Ancillary state" means any state other than a domiciliary state.

(f) "Reciprocal state" means any state other than this state in which in substance and effect the provisions of this act are in force, including the provisions requiring that the commissioner or equivalent insurance supervisory official be the receiver of a delinquent insurer. A "reciprocal state" includes any state also which has, through its commissioner or equivalent supervisory official, entered into a binding and enforceable written agreement with the commissioner of this state which provides that (1) a commissioner or equivalent supervisory official is required to be the receiver of a delinquent insurer; (2) title to assets of the delinquent insurer shall vest in the domiciliary receiver, as of the date of any court order appointing him or her as receiver, and he or she shall have the same rights to recover those assets as provided under subdivision (b) of Section 1064.3; (3) nondomiciliary creditors may file and prove their claims before ancillary receivers; (4) the laws of the domiciliary state of the delinquent insurer shall be applied uniformly to residents and nonresidents in the allowance of preference of claims, except for claims to special deposits created under the laws of the domiciliary state; (5) preferences (including attachments, garnishments, and liens) for creditors with advance information shall be prevented; and (6) the domiciliary receiver may sue in the reciprocal state to recover any assets of a delinquent insurer to which he or she may be entitled under the law.

(g) "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons or limited class or classes of persons, and as to such specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders or all policyholders and creditors in the United States, shall be deemed general assets.

(h) "Preferred claim" means any claim with respect to which the law of a state accords priority of payment from the general assets of the insurer.

(i) "Special deposit claim" means any claim secured by a deposit made for the security or benefit of a limited class or classes of persons, but not including any general assets.

(j) "Secured claim" means any claim secured by mortgage, trust, deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims, which more than four months prior to the commencement of delinquency proceedings in the state of the insurer's domicile, have become liens upon specific assets by reason of judicial process.

(k) "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require.

§ 1064.2. Conduct of delinquency proceedings against insurers domiciled in this state

(a) Whenever under the laws of this state a receiver is to be appointed in delinquency proceedings for an insurer domiciled in this state, the court shall appoint the commissioner as receiver. Upon the appointment, the court shall direct the receiver forthwith to take possession

of the assets of the insurer and to administer them under the orders of the court.

(b) The domiciliary receiver and his or her successors in office shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer wherever located, as of the date of the order of his or her appointment, and he or she shall have the right to recover the same and reduce them to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are prescribed in this article for ancillary receivers appointed in this state as to assets located in this state. The filing or recording of the order appointing the receiver or certified copy thereof, in the office where instruments affecting title to property are required to be filed or recorded shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded. The domiciliary receiver shall be responsible on his or her official bond for the proper administration of all assets coming into his or her possession or control.

(c) Upon taking possession of the assets of a delinquent insurer the domiciliary receiver shall, subject to the direction of the court, and in accordance with such procedures as the receiver may petition the court to establish, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by the laws of this state for the purpose of liquidating, rehabilitating, reorganizing, or conserving the affairs of the insurer. In connection with delinquency proceedings, he or she may appoint one or more special deputy commissioners to act for him or her, and may employ such counsel, clerks, and assistants as he or she deems necessary. The compensation of the special deputies, counsel, clerks, or assistants and all expenses of taking possession of the delinquent insurer and of conducting the delinquency

proceedings shall be fixed by the receiver, subject to the approval of the court, and shall be paid out of the funds or assets of the insurer. Within the limits of the duties imposed upon them, special deputies shall possess all the powers given to, and, in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to delinquency proceedings.

§ 1064.3. Conduct of delinquency proceedings against insurers not domiciled in this state

(a) Whenever under the laws of this state an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this state, the court shall appoint the commissioner as ancillary receiver. The commissioner shall file an application requesting the appointment (1) if he or she finds that there are sufficient assets of that insurer located in this state, or that there are sufficient persons residing in this state having claims against that insurer, to justify the appointment of an ancillary receiver, or (2) if 10 or more persons resident in this state having claims against the insurer file an application with the commissioner requesting the appointment of an ancillary receiver.

(b) The domiciliary receiver of an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer located in this state, and he or she shall have the immediate right to recover balances due from local agents and to obtain possession of any books and records of the insurer found in this state. He or she shall also be entitled to recover the other assets of the insurer located in this state except that upon the appointment of an ancillary receiver in this state, the ancillary receiver shall, during the ancillary receivership proceedings, have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those

special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this state, and shall pay the necessary expenses of the proceedings. All remaining assets shall be promptly transferred to the domiciliary receiver. Subject to the foregoing provisions, the ancillary receiver and his or her deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets, as a receiver of an insurer domiciled in this state.

(c) Notwithstanding any other provision of this article, in any ancillary receivership proceeding in this state against an insurer domiciled in a reciprocal state, assets located in this state which comprise all or part of any deposit by that insurer under the laws of that reciprocal state for the benefit and security of beneficiaries of awards of workers' compensation against insurers shall be returned promptly to the domiciliary receiver, if he or she so requests, without deduction of any amounts to satisfy claims of policyholders and creditors.

§ 1064.4. Filing and proving of claims of nonresidents against delinquent insurers domiciled in this state

(a) In a delinquency proceeding begun in this state against an insurer domiciled in this state, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any in their respective states, or with the domiciliary receiver. All claims shall be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(b) Controverted claims belonging to claimants residing in reciprocal states may either (1) be proved in this state as provided by law, or (2), if ancillary proceedings have been commenced in those reciprocal states, be proved in those proceedings. In the event a claimant elects to prove his or her claim in ancillary proceedings, if notice

of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this state as provided in Section 1064.5 with respect to ancillary proceedings in this state, the final allowance of such claim by the courts in the ancillary state shall be accepted in this state as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state.

§ 1064.5. Filing and proving of claims of residents against delinquent insurers domiciled in reciprocal states

(a) In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer who reside within this state may file claims either with the ancillary receiver, if any, appointed in this state, or with the domiciliary receiver. All such claims shall be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceeding.

(b) Controverted claims belonging to claimants residing in this state may either (1) be proved in the domiciliary state as provided by the laws of that state, or (2), if ancillary proceedings have been commenced in this state, be proved in those proceedings. In the event that any such claimant elects to prove his or her claim in this state, he or she shall file his or her claim with the ancillary receiver in the manner provided by the law of this state for the proving of claims against insurers domiciled in this state, and he or she shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least 40 days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver, within 30 days after the giving of notice, shall give notice in writing to the ancillary receiver and to the

claimant, either by registered mail or by personal service, of his or her intention to contest that claim, he or she shall be entitled to appear or to be represented in any proceeding in this state involving the adjudication of the claim. The final allowance of the claim by the courts of this state shall be accepted as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within this state.

§ 1064.6. Priority of preferred claims

(a) In a delinquency proceeding against an insurer domiciled in this state, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of this state. All such claims, whether owing to residents or nonresidents, shall be given equal priority of payment from general assets regardless of where such assets are located.

(b) In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of this state shall be preferred if like claims are preferred by the laws of that state.

§ 1064.7. Priority of special deposit claims

The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provision governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but, unless applicable law provides otherwise, the sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective special deposits, have been paid percentages of their

claims equal to the percentage paid from the special deposit.

§ 1064.8. Priority of secured claims

The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his or her security and file his or her claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this article, or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, that amount shall be conclusive; otherwise the amount shall be determined in the delinquency proceeding in the domiciliary state.

§ 1064.9. Attachment and garnishment of assets

During the pendency of delinquency proceedings in this this or any reciprocal state, no action or proceeding in the nature of an attachment, garnishment, or execution shall be commenced or maintained in the courts of this state against the delinquent insurer or its assets. Any lien obtained by any such action or proceeding within four months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding.

§ 1064.10. Right of domiciliary receiver to sue in this state

The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this state to recover any assets of that insurer to which he or she may be entitled under the laws of this state.

§ 1064.11. Severability

If any provision of this article or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

§ 1064.12. Short title; uniformity of interpretation; application of § 1010 et seq.

(a) This article may be referred to as the "Uniform Insurers Rehabilitation Act."

(b) The Uniform Insurers Rehabilitation Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. To the extent that its provisions, when applicable, conflict with Article 14 (commencing with Section 1010), the provisions of this article shall control. The provisions of Article 14 (commencing with section 1010) not in conflict with this article shall be unaffected by it.

(c) This article does not apply in regard to insurers domiciled in any state that is not a reciprocal state, and to any insurer domiciled in a reciprocal state before that state appoints a domiciliary receiver for the insurer. All those insurers shall be governed by Article 14 (commencing with Section 1010). If a domiciliary receiver is appointed in a reciprocal state while a receivership is proceeding under Article 14 (commencing with Section 1010), the receiver under that article shall thereafter act as ancillary receiver under Section 1064.3.

The pertinent provisions of the Judiciary Act, codified as 28 U.S.C. §§ 1332(a), 1441(a), (c), provide as follows:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

* * * *

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

* * * *

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

* * * *

APPENDIX E

[Filed Oct. 31, 1985]

SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

No. C572724

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION INSURANCE COMPANY,
a California corporation,
Respondent.

ORDER APPOINTING CONSERVATOR AND
RESTRAINING ORDER

The verified Application of the Insurance Commissioner of the State of California, having been filed herein and it appearing to the Court from said Application that Respondent herein is in such condition that it is insolvent within the meaning of the Insurance Code and that its further transaction of business will be hazardous to its policyholders, its creditors, and to the public,

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Mission Insurance Company, Respondent herein, and is directed as such Conservator to conduct the business of Respondent or so much thereof as to the Applicant may seem appropriate; and Applicant is authorized

as such Conservator in his discretion to pay or defer payment of all proper claims and of obligations against Respondent accruing prior to or subsequent to his appointment as Conservator;

2. That said Conservator forthwith take possession of all of Respondent's assets, books, records and property, both real and personal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office title to all of the property and assets of said Respondent, and all persons are enjoined from interfering with said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, and agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of Respondent's property or assets until further order of this court;

5. That all persons are enjoined from instituting or maintaining any action at law or suit in equity including but not limited to matters in arbitration, against said Respondent or against said Conservator of said Respondent, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, including proceeds payable under any reinsurance contracts, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent;

7. That all funds in bank accounts, including Certificates of Deposit, in the name of Respondent in various banks in the State of California are hereby vested in the Conservator and subject to withdrawal upon his order only;

8. That any and all agents of Respondent and all brokers who have done business for Respondent make all remittances of funds collected by them or in their hands directly to the Applicant as Conservator;

9. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to the Conservator; that all persons are enjoined from using any of such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such legal or equitable actions in this or other states as he may deem necessary to carry out his duties as Conservator of Respondent, Mission Insurance Company.

DATED: October 31, 1985

/s/ John L. Cole
JOHN L. COLE
Judge of the Superior Court

[Filed Feb. 24, 1987]

SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

No. C572724

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION INSURANCE COMPANY,
a California corporation,
Respondent.

ORDER APPOINTING LIQUIDATOR
AND RESTRAINING ORDER

The verified Application for Order of Liquidation of Respondent, Mission Insurance Company came on regularly for hearing on February 24, 1987, in Department 86 at 9:00 a.m., the Honorable Ricardo Torres, judge presiding. Applicant appeared by his counsel, John K. Van De Kamp, Attorney General of the State of California, by Raymond Jue, Deputy Attorney General, there was no other appearance.

IT IS HEREBY ORDERED THAT:

1. The Insurance Commissioner of the State of California is appointed in his official capacity as Liquidator of Respondent, Mission Insurance Company and directed to liquidate and wind up the affairs of Respondent in California and to act in all ways and exercise all powers necessary for the purpose of carrying out this order;

2. Title to all assets of Respondent now in the possession of the Insurance Commissioner as Conservator hereof, as well as title to any assets of said Respondent discovered hereafter is hereby vested in said liquidator;

3. Said Liquidator, as such, is hereby authorized to pay as expenses of administration, all expenses heretofore incurred by the conservator of Respondent and presently unpaid and is hereby authorized to pay the full amount of any checks or drafts which have been issued by the conservator of Respondent and which are presently outstanding and unpaid, when said checks or drafts are presented for payment;

4. The rights and liabilities of creditors, policyholders, shareholders, and all other persons interested in the assets of Respondent, including the State of California, are fixed as of the date of entry of this order;

5. Respondent and its officers, directors, agents and employees and all other persons are hereby enjoined and restrained from transacting any of the business of Respondent in California or the disposition of any of its assets or property;

6. All persons are hereby enjoined and restrained from interfering with the possession, title and rights of Applicant as liquidator, in and to the assets of Respondent, and from interference with the conduct of the liquidation in the winding up of the business of Respondent;

7. All persons are hereby enjoined from the waste of assets of Respondent;

8. All persons are hereby enjoined from instituting or prosecuting any action or proceedings against Respondent, or Applicant as Liquidator of Respondent, without the consent of this court obtained after reasonable notice to said Liquidator;

9. All persons are hereby enjoined from obtaining preferences, judgments, attachments or other liens, or

making any levy against Respondent or its assets without the consent of this court obtained after reasonable notice to said Liquidator;

10. All officers, directors, agents and employees of Respondent are hereby ordered to deliver to said Liquidator all assets, books, records, equipment and other property of said Respondent;

11. All funds and bank accounts in the name of Respondent, or Applicant as Conservator, are hereby vested in said Liquidator and said funds shall be subject to withdrawal from said banks upon the order of said Liquidator only;

12. All insurance agents and brokers are hereby ordered to account to the Liquidator of Respondent for all funds of Respondent held by them in their fiduciary capacity, as specified in Sections 1733, 1734 and 1735 of the Insurance Code, or due to Respondent, and directed to forward said funds to Applicant as Liquidator, and said funds are vested in Applicant as Liquidator; and

13. Said Liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as Liquidator.

DATED: February 29, 1987.

/s/ Ricardo Torres
RICARDO TORRES
Judge of the Superior Court

122a

[Filed Mar. 5, 1987]

SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

Case No.: C 572 724

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION INSURANCE COMPANY,
a California corporation,
Respondent.

Case No.: C 576 416

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION REINSURANCE CORPORATION,
a Missouri corporation,
Respondent.

Case No.: C 576 324

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION NATIONAL INSURANCE COMPANY,
a California corporation,
Respondent.

123a

Case No.: C 576 325

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

ENTERPRISE INSURANCE COMPANY,
a California corporation,
Respondent.

Case No.: C 576 323

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

HOLLAND-AMERICA INSURANCE COMPANY,
a Missouri Corporation,
Respondent.

SUPPLEMENTAL ORDER REGARDING
ORDER APPOINTING LIQUIDATOR
AND RESTRAINING ORDER

The Receiver's Motion for Supplemental Order Regarding Order Appointing Liquidator and Restraining Order came on for consideration on March 5, 1987, in Department 86 at 1:30 p.m. The Receiver appeared by her counsel of record and there were no other appearances.

IT IS ORDERED THAT:

The Order Appointing Liquidator and Restraining Order entered in each of the above-captioned matters on February 24, 1987 (the "Liquidation Order") is hereby in all things reconfirmed and shall in all things remain in full force and effect;

It is hereby found and declared that the above-captioned companies (the "Respondent Companies") are and were

as of the entry of the Liquidation Order insolvent and that the Liquidation Order constitutes an order of insolvency and finding of insolvency with respect to each of the Respondent Companies;

There is hereby vested in the Liquidator herein and her successors in office exclusive and sole title to all of the property and assets of each of the Respondent Companies, of any kind or nature wherever situated, and all persons and other legal entities are enjoined from asserting dominion and control over same and from interfering with the said Liquidator's dominion, control, possession or title thereto; provided further, however, that with respect to Mission Reinsurance Corporation and Holland-America Insurance Company, both of which are domiciled in the State of Missouri this injunction shall relate only to property of such companies located within the State of California;

Subject to the rights of the Domicillary Receiver, if any, of the said Missouri companies, all persons are enjoined from instituting or maintaining any action at law or suit in equity including, but not limited to matters in arbitration, against said Respondents or against said Liquidator of said Respondent companies or proceeding against any of the assets or property of Respondents, including interfering with the Liquidator, or the exclusive jurisdiction of this court as provided for above, except after an order from this court obtained on good cause shown after reasonable notice to the Liquidator.

Subject to the limitation above concerning the Missouri Domiciled Companies, this court hereby continues its assumption of sole exclusive and continuing jurisdiction over all assets and property of Respondents and hereby asserts and assumes sole and exclusive jurisdiction over same to the exclusion of all others and further continues to assert and assume sole and exclusive jurisdiction to administer the said assets and property of the Respondents

through the Liquidator, and to determine the validity or invalidity of any and all claims to or affecting such assets;

The Order Approving Appointment, Retention Agreement and Fee Agreement entered herein on or about October 8, 1987 relating to Karl L. Rubinstein is hereby reaffirmed with respect to the Liquidation proceedings affecting Respondents and Karl L. Rubinstein shall continue to serve as Special Deputy Insurance Commissioner herein pursuant to such Order.

The Order Approving Appointment and Fee Agreement entered herein on or about February 2, 1987 relating to William Price is hereby reaffirmed with respect to the Liquidation proceedings affecting Respondents and William Price shall continue to serve as Special Deputy Insurance Commissioner herein pursuant to such Order;

The said Special Deputies and any of their partners, associates, employees or others associated with them shall, in the performance of any of their duties herein, be deemed to be a public officer acting in their official capacity on behalf of the state, and shall have no personal liability for or arising out of their acts or omissions performed in good faith in connection with their services performed in connection with Respondents or these Liquidation proceedings.

A hearing is hereby set for 9:00 a.m. on the 6th day of April, 1987 in Department 86 at which time any and all persons or other legal entities desiring to object to, comment upon, present evidence or comments with respect to or in any other way deal with the Liquidator's said Motion or this Order must do so. Any such objections, comments or other matter relating to the subject matter hereof must be made at such hearing or the same shall irrevocably be deemed waived.

It is further ordered that twenty (20) days Notice of this Order and Hearing shall be given to the Shareholders

of the Respondents, to the California Insurance Guaranty Association and to such other persons or other legal entities, if any, who shall, as of the date hereof, have entered their Request for Notice herein. It is hereby determined and decreed that such notice is fair, reasonable and sufficient and that no other or further notice is necessary or required.

/s/ Ricardo A. Torres
Judge of the Superior Court

DATED: March 5, 1987

APPENDIX F

[Excerpt of Respondent Allstate's Opening Brief]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-55855

ROXANI GILLESPIE, INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA, in Her Capacity as Liquidator
of MISSION INSURANCE COMPANY, MISSION NATIONAL
INSURANCE COMPANY, ENTERPRISE INSURANCE COM-
PANY, HOLLAND-AMERICA INSURANCE COMPANY and
MISSION REINSURANCE CORPORATION,

Plaintiff-Appellee,

vs.

ALLSTATE INSURANCE COMPANY,
Defendant-Appellant,

and

INSURANCE COMPANY OF NORTH AMERICA,
Defendant.

On Appeal From the United States District Court
For the Central District of California
No. CV-90-4713 WMB

OPENING BRIEF OF DEFENDANT-APPELLANT
ALLSTATE INSURANCE COMPANY

* * * *

As the pendency of these other suits in federal court demonstrates, the fact that this lawsuit will have an effect on the amount of money available for distribution to Mission's creditors does not approach the kind of "undue interference" with state administrative matters necessary to justify abstention under *Burford*. The *NOPSI* decision itself makes this clear. In formulating the *Burford* abstention doctrine, the Court held that under *Burford* "a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies." 109 S. Ct. at 2514 (emphasis supplied). The reference to equitable actions was no accident; the same language appears elsewhere in the Supreme Court's opinion. See *id.* at 2513 (observing that abstention was ordered in the *Burford* case because "the exercise of equitable jurisdiction by comparatively unsophisticated Federal District Courts alongside state court review had repeatedly led to '[d]elay, misunderstanding of local law, and needless federal conflict with state policy'") (emphasis supplied). While *NOPSI* may not expressly hold that *Burford* abstention applies only in cases arising in equity rather than at law, at a minimum the Court's language counsels that the "exceptional circumstances" supporting an order of abstention are all the more rare in actions, at law, for money damages. The Third Circuit so concluded in its very recent decision in *University of Maryland v. Peat Marwick Main & Co.*, rejecting *Burford* abstention on the ground, among others, that:

Here, unlike *Burford* and the other Supreme Court cases involving *Burford* doctrine, the action was at law, not in equity, and sought money damages.

923 F.2d at 271.

The conclusion that *Burford* abstention obtains principally if not solely in equitable proceedings, and not in mere actions at law for money damages, is fully consistent with the Supreme Court's earlier decisions. The *Burford*

doctrine was developed in instances in which a federal court was asked to review a state court administrative decision, such as the decision to grant or deny a drilling permit in *Burford*.¹⁷ See also *Alabama Public Service Com'n v. Southern Ry Co.*, 341 U.S. 341, 342, 71 S.Ct. 762, 764 (1951) (abstention proper in action seeking "to enjoin the members of the Alabama Public Service Commission and the Attorney General of Alabama . . . from enforcing laws of Alabama prohibiting discontinuance of certain railroad passenger service"). The possibility of interference with proceedings or orders of state administrative agencies is obviously much greater where the federal court is asked to review or enforce a state administrative order, or to grant injunctive relief in support of or against the order. The potential for some direct affront to the state's proceedings or policy is greatly diminished when the federal proceeding is merely one at law for the recovery of money damages.

In *Burford*, for instance, there was an impermissible danger of federal interference because the federal court was being asked to disapprove the Texas Railway Commission's administrative ruling approving a permit to drill four oil wells, where the state had developed "its own elaborate review system for dealing with the geological complexities of oil and gas fields." *Colorado River*, 424 U.S. at 815, 96 S.Ct. at 1245 (discussing *Burford*, 319 U.S. at 326, 63 S.Ct. at 1103). No such improper interference would have been presented if the Railway Com-

¹⁷ This type of review, in which a federal District Court is asked to invalidate or enjoin a state court administrative decision or proceeding, is an equitable proceeding rather than one at law. See generally D. Dobbs, *Handbook on the Law of Remedies*, § 2.1 at 28 (1973) (equity cases include those in which "some equitable remedy, usually of a coercive nature, is sought . . . [such as] an injunction . . . or specific performance of a contract").

mission had merely filed a civil damages action in federal court, as the receiver of an insolvent drilling company, to recover payments due from third parties—just as the Commissioner here seeks to recover reinsurance balances on Mission's behalf.

The present case amply demonstrates the absence of any basis for abstention in a typical civil damages action. In this suit at law for money damages, the state's interest in the outcome of the proceeding is no different from that of any other civil plaintiff: the Commissioner wants money from Allstate. The situation might be different if, for instance, Allstate were challenging the denial of authorization to write a certain kind of insurance in California, and the issue presented was whether the Commissioner had reasonably concluded that allowing Allstate to do so would flood the market, causing rates to drop and hence driving out smaller, independent insurers. Such a suit, of course, would be akin to the dispute in the *Burford* case, where the federal court's intervention threatened to overturn the state Railway Commission's attempt to maintain an intricate balance in the allocation of drilling rights.

* * * *

[Excerpt of Respondent Allstate's Reply Brief]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55855

No. 91-55907

JOHN GARAMENDI, INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA, IN HIS CAPACITY AS TRUSTEE
OF THE MISSION INSURANCE COMPANY TRUST, MIS-
SION NATIONAL INSURANCE COMPANY TRUST, ENTER-
PRISE INSURANCE COMPANY TRUST, MISSION REINSUR-
ANCE CORPORATION TRUST, and HOLLAND-AMERICA IN-
SURANCE COMPANY TRUST as successor to Roxani Gil-
lespie, Insurance Commissioner of the State of California,
in her capacity as liquidator of Mission Insurance Com-
pany, Mission National Insurance Company, Enterprise
Insurance Company, Holland-America Insurance Com-
pany and Mission Reinsurance Corporation,

vs. *Plaintiff-Appellee,*

ALLSTATE INSURANCE COMPANY and
INSURANCE COMPANY OF NORTH AMERICA,
Defendants-Appellants.

On Appeal From the United States District Court
for the Central District of California

REPLY BRIEF OF APPELLANTS ALLSTATE
INSURANCE COMPANY AND INSURANCE
COMPANY OF NORTH AMERICA

* * * *

* * * *

Defendants overstate the impact of *NOPSI*, the Commissioner argues, because that decision did not hold that the *Burford* abstention doctrine applies only to equity cases. (Commissioner's Brief, at pages 29-32.) This is a straw man argument, for defendants do not ask this Court to hold that *Burford* must be strictly confined to equity suits. Instead, defendants simply note that *Burford* has typically been applied—as the Supreme Court intimated in *NOPSI*—in equitable proceedings, in which matters of substantial public policy import are more likely to arise than in a civil damages case like this action. The Commissioner presents no meaningful argument to the contrary, other than to cite a not-for-publication decision by the District of New Jersey that briefly discusses the application of *Burford* to actions at law. *Commissioner of Insurance of the State of New Jersey v. Mid-American General Agency, Inc.*, No. 91-1380 (D.N.J. Oct. 21, 1991).¹⁰

* * * *

¹⁰ Finally, the Commissioner argues that the District Court should not have stayed the action on the basis of *Burford* abstention. (Commissioner's Brief, at 33 *et seq.*). This argument misses the point. Defendants contend only that a stay would have been proper if the basis for abstaining, as it appears largely to have been, is the pendency before the California.

(2)
No. 95-244

Supreme Court, U.S.
FILED

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1995

**CHUCK QUACKENBUSH, INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
LIQUIDATOR AND TRUSTEE OF THE MISSION
INSURANCE COMPANY TRUST, MISSION NATIONAL
INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE
COMPANY TRUST, HOLLAND-AMERICA INSURANCE
COMPANY TRUST AND MISSION REINSURANCE
CORPORATION TRUST,
*Petitioner,***

vs.

**ALLSTATE INSURANCE COMPANY,
*Respondent.***

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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**RESPONDENT'S STATEMENT OF
QUESTIONS PRESENTED**

1. Whether an order remanding a removed action to state court based on the *Burford* abstention doctrine is reviewable by appeal, and not merely by mandamus, under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

2. Whether an action at law which seeks only money damages, and no equitable relief, can present the exceptional circumstances necessary for a federal court to decline to exercise its jurisdiction based on *Burford* abstention, or instead whether *Burford* abstention is appropriate only in equitable proceedings.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The Appellant in the Ninth Circuit and Respondent here is Allstate Insurance Company. The Appellee in the Ninth Circuit was John Garamendi, Insurance Commissioner of the State of California, in his capacity as Liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company, and Mission Reinsurance Corporation. Chuck Quackenbush, the Petitioner here, is the statutory successor to Mr. Garamendi.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I.	
THE DISTRICT COURT'S REMAND ORDER WAS A COLLATERALLY FINAL ORDER WHICH GAVE RISE TO A RIGHT OF APPEAL	11
II.	
THE NINTH CIRCUIT'S ABSTENTION ORDER IS CONSISTENT WITH THIS COURT'S PREVIOUS RULINGS AND WITH THE CURRENT TREND IN THE CASELAW	18
CONCLUSION	26

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Ainsworth v. Allstate Ins. Co.</i> , 634 F. Supp. 52 (W.D. Mo. 1985)	5
<i>Alabama Public Service Comm'n v. Southern Ry. Co.</i> , 341 U.S. 341 (1951)	24
<i>American Re-Insurance Co. v. Insurance Comm'r of California</i> , 527 F. Supp. 444 (C.D. Cal. 1981) ..	4
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943)	passim
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949)	7, 8, 9, 12, 14, 16, 17
<i>Colorado River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976)	12, 18, 19, 21, 26
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463 (1978)	13
<i>Corcoran v. Ardra Ins. Co.</i> , 842 F.2d 31 (2d Cir. 1988)	9, 15, 16
<i>Costle v. Fremont Indem. Co.</i> , 839 F. Supp. 265 (D. Vt. 1993)	23
<i>C-Y Dev. Co. v. City of Redlands</i> , 703 F.2d 375 (9th Cir. 1983)	18
<i>In Re Delta American Re Insurance Co.</i> , 900 F.2d 890 (6th Cir.), cert. denied, 498 U.S. 890 (1990)	4, 5
<i>Doughty v. Underwriters at Lloyd's, London</i> , 6 F.3d 856 (1st Cir. 1993)	9, 16, 17
<i>Duane v. Government Employees Inc. Co.</i> , 784 F. Supp. 1209 (D. Md. 1992)	23
<i>Excess & Casualty Reinsurance Ass'n v. Insurance Comm'r of California</i> , 656 F.2d 491 (9th Cir. 1981)	4
<i>Foster v. Chesapeake Inc. Co.</i> , 933 F.2d 1207 (3d Cir.), cert. denied, 502 U.S. 908 (1991)	14

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Fragoso v. Lopez</i> , 991 F.2d 878 (1st Cir. 1993)	23
<i>Garamendi v. Allstate Ins. Co.</i> , 47 F.3d 350 (9th Cir. 1995)	passim
<i>Great Lakes Dredge & Dock Co. v. Huffman</i> , 319 U.S. 293 (1943)	24
<i>Hager v. Davis Transport, Inc.</i> , 901 F.2d 1470 (8th Cir. 1990)	5
<i>Idlewild Bon Voyage Liquor Corp. v. Epstein</i> , 370 U.S. 713 (1962)	12
<i>Karl Koch Erecting Co. v. New York Convention Cir. Dev. Corp.</i> , 838 F.2d 656 (2d Cir. 1988)	15
<i>McDermott Int'l v. Lloyds Underwriters of London</i> , 944 F.2d 1199 (5th Cir. 1991)	14, 15
<i>Melahn v. Pennock Ins., Inc.</i> , 965 F.2d 1497 (8th Cir. 1992)	14, 15, 21
<i>Minot v. Eckardt-Minot</i> , 13 F.3d 590 (2d Cir. 1994)	15, 16
<i>Mobil Oil Corp. v. City of Long Beach</i> , 772 F.2d 534 (9th Cir. 1985)	18
<i>Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983)	passim
<i>New Orleans Public Service, Inc. v. Council of City of New Orleans</i> , 491 U.S. 350 (1989)	passim
<i>Pas v. Travelers Ins. Co.</i> , 7 F.3d 349 (3d Cir. 1993)	14
<i>Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.</i> , 741 F.2d 273 (9th Cir. 1984)	13, 14
<i>Regis Assocs. v. Rank Hotels (Management) Ltd.</i> , 894 F.2d 193 (6th Cir. 1990)	14
<i>Ruhlin v. New York Life Ins. Co.</i> , 304 U.S. 202 (1938)	20

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Salve Regina College v. Russell</i> , 499 U.S. 225 (1991)	20
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104 (1964)	17
<i>Thermtron Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336 (1976)	6, 8, 11, 12, 15
<i>University of Md. v. Peat Marwick Main & Co.</i> , 923 F.2d 265 (3d Cir. 1991)	18, 23
<i>West v. American Tel. & Tel. Co.</i> , 311 U.S. 223 (1940)	20
<i>Wolfson v. Mutual Benefit Life Ins. Co.</i> , 51 F.3d 141 (8th Cir. 1995)	14, 21, 22, 27
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	24, 25

Statutes

Federal Arbitration Act, 9 U.S.C. §§ 1-16	2, 5, 19
9 U.S.C. § 205	16
McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015	2
28 U.S.C. § 1291	12, 13, 16
28 U.S.C. § 1441	5
28 U.S.C. § 1447	2, 6, 11, 15

Rules

Supreme Court Rule of Procedure, Rule 14.1(f)	2
---	---

Other Authorities

E. Chemerinsky, <i>FEDERAL JURISDICTION</i> § 12.3 at 612 (1989)	13
---	----

TABLE OF AUTHORITIES

Other Authorities

	<u>Page</u>
R. Jacks, <i>Arbitration & Insurer Insolvencies: The Triumph of Common Sense Over Abstract Principle</i> , in ABA NATIONAL INSTITUTE ON INSURER INSOLVENCY, <i>LAW & PRACTICE OF INSURANCE COMPANY INSOLVENCY</i> at 260, 261 (1986)	19
H. Kramer, <i>The Nature of Reinsurance</i> , at 1-3, in R. Strain (ed.), <i>REINSURANCE</i> (1980)	3
Spector, <i>When Your Reinsurance Partner Goes Bust</i> , in <i>BEST'S REVIEW: PROPERTY-CASUALTY INS.</i> ED. (1986)	19, 20
19 C. Wright, A. Miller, & E. Cooper, <i>FEDERAL PRACTICE & PROCEDURE: JURISDICTION</i> § 4507 (1982)	20

No. 95-244

In the

Supreme Court of the United States

OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
LIQUIDATOR AND TRUSTEE OF THE MISSION
INSURANCE COMPANY TRUST, MISSION NATIONAL
INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE
COMPANY TRUST, HOLLAND-AMERICA INSURANCE
COMPANY TRUST AND MISSION REINSURANCE
CORPORATION TRUST,
Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,
Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Respondent Allstate Insurance Company ("Allstate") respectfully submits this brief in opposition to the Petition for Writ of Certiorari filed by Petitioner Chuck Quackenbush, Insurance Commissioner of the State of California, as the Liquidator of the Mission Group of Insurance Companies ("the Liquidator").

OPINIONS BELOW

Allstate does not disagree with the citations to the opinions below contained in the Petition. In addition, Allstate reproduces as Appendix 1 the order of the Ninth Circuit issued on February 14, 1992 denying the Liquidator's motion to dismiss the appeal below.

JURISDICTION

Allstate agrees with the statement of jurisdiction contained in the Petition.

STATUTES INVOLVED

In addition to those statutes cited in the Petition, Allstate identifies 28 U.S.C. § 1447 and the Federal Arbitration Act, 9 U.S.C. §§ 1-16, as statutes involved in this case. Those provisions are set forth in Appendix 2 hereto.

Allstate disagrees with the Liquidator's assertion that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, and the cited provisions of the California Insurance Code (Pet. Cert., at 2) are involved in this case within the meaning of this Court's Rule 14.1(f).

STATEMENT OF THE CASE

This is a civil damages action filed by the California Insurance Commissioner as liquidator of five members of the Mission Group of Insurance Companies ("Mission"). The lawsuit was filed in Los Angeles Superior Court in June 1990 against Allstate and several other companies that had reinsured Mission affiliates.¹ The dispute vis-a-vis

¹The term "reinsurance" refers to the practice by which one insurer spreads its insurance risk by assigning (or "ceding") portions of its risk to other insurance companies acting as "reinsurers." Typically, the

Mission and Allstate arises from Allstate's having been both reinsured by Mission and a reinsurer of Mission under more than five thousand separate reinsurance agreements entered into during the period of November 1976 to August 1984. The Liquidator seeks to recover reinsurance balances of approximately \$7 million allegedly due from Allstate as a reinsurer of Mission. Allstate disputes the balances claimed from it, contending, among other defenses, that Allstate is entitled to set off approximately \$24 million in reinsurance balances that are due Allstate from Mission as Allstate's reinsurer.²

Though this action was filed by the California Insurance Commissioner in his capacity as liquidator of Mission, the lawsuit is a straightforward commercial reinsurance dispute. The claims asserted by the Liquidator are entirely derivative of those held by Mission before its insolvency. The Liquidator contends, principally, that Allstate breached its contractual obligations to Mission by failing to pay reinsurance balances that are due. Based on this allegation, the Commissioner's complaint states claims for breach of contract, tortious breach of the covenant of good faith and fair dealing, tortious denial of the existence of contract, and declaratory relief.

Just as important, the only remedy sought by the Liquidator is an award of money damages for the reinsur-

reinsurers agree to assume a percentage of the risk under an insurance policy or class of policies in return for a corresponding share of the premiums. *See generally* H. Kramer, *The Nature of Reinsurance*, at 1-3, in R. Strain (ed.), *REINSURANCE* (1980).

²The \$7 and \$24 million figures consist of three categories: paid losses, reserves established for known claims, and reserves for "incurred but not reported" claims (known in the industry as "IBNR"), that is, claims for losses that have been incurred but have not been reported by the insured.

ance balances allegedly due.³ Thus, this lawsuit presents no risk of interference with any state administrative proceeding or policy. Indeed, the only impact this case can have on the liquidation of Mission is that, if the Liquidator prevails, there will be marginally more money available to distribute to Mission's creditors than the \$1.2 billion the Liquidator has reportedly collected from other reinsurers.

In fact, the California Insurance Commissioner routinely files collection actions like this case in state and federal courts throughout the country. For this reason, the California Superior Court order appointing the Commissioner as Mission's liquidator expressly empowers him to bring suits "in other state courts" to recover assets on Mission's behalf.⁴ The federal courts, over a period of years, have asserted jurisdiction repeatedly over precisely such civil collection suits by liquidators of insolvent insurers — including suits by the California Insurance Commissioner seeking to recover reinsurance balances due an insolvent insurer.⁵

³The Commissioner also prays for the functionally equivalent remedy of a declaration as to the parties' respective liability under the reinsurance agreements at issue.

⁴See "Order Appointing Liquidator and Restraining Order" included in Appendix E to the Petition for Certiorari at page 119a. Paragraph 13 of this Order provides:

[The] liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as liquidator.

Appendix at 121a (emphasis supplied).

⁵See, e.g., *American Re-Insurance Co. v. Insurance Comm'r of California*, 527 F. Supp. 444 (C.D. Cal. 1981) (diversity suit brought by a reinsurer seeking declaratory relief against the California Insurance Commissioner as receiver for an insolvent insurer); *Excess & Casualty Reinsurance Ass'n v. Insurance Comm'r of California*, 656 F.2d 491 (9th Cir. 1981) (interpleader suit brought by a reinsurer seeking a determination of who should receive reinsurance proceeds upon the insolvency of a reinsured company); *In Re Delta America Re Insurance*

Allstate removed this action on August 2, 1990 to the United States District Court for the Central District of California on the basis of diversity of citizenship.⁶ Allstate then moved under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, to compel arbitration of the Liquidator's claims against it based on arbitration agreements contained in virtually all of the reinsurance agreements between Allstate and Mission.⁷ The District Court ordered the motion off calendar to consider first whether the action should proceed in the federal court.

Co., 900 F.2d 890 (6th Cir.), *cert. denied*, 498 U.S. 890 (1990) (reversing order remanding to state court suit brought by Kentucky Insurance Commissioner to recover reinsurance proceeds due insolvent insurer); *Hager v. Davis Transport, Inc.*, 901 F.2d 1470 (8th Cir. 1990) (suit by Iowa Insurance Commissioner seeking to recover unpaid premiums due insolvent insurer; action removed to federal court by defendant insurer); *Ainsworth v. Allstate Ins. Co.*, 634 F. Supp. 52 (W.D. Mo. 1985) (suit by Missouri receiver of two insolvent insurers to recover reinsurance balances; defendants removed action to federal court, which ordered arbitration).

⁶There were 19 reinsurers named as defendants in the Superior Court lawsuit against Allstate. Of these defendants, only two — Allstate and the Insurance Company of North America (INA) — were ever served. Allstate removed the Superior Court action to federal court on the ground that there was diversity jurisdiction vis-a-vis Allstate and the Commissioner and the claims asserted against Allstate were separate and independent of the claims alleged against non-diverse defendants, permitting removal under 28 U.S.C. § 1441(c). Subsequently, the Commissioner filed a notice of dismissal of all non-diverse defendants. This led Allstate and INA to file a supplemental petition to remove based on complete diversity between the plaintiff and the remaining defendants.

⁷Arbitration agreements are contained in each of the large reinsurance "treaties" entered into between Allstate and Mission. These reinsurance treaties, some 67 in number, cover large classes of business, and give rise to the vast majority of the reinsurance balances in dispute. The other reinsurance agreements, covering a single, large risk, are known as "facultative certificates"; virtually all of these agreements also contained provisions for binding industry arbitration.

On July 3, 1991, the District Court entered an order remanding the case to Los Angeles Superior Court. The District Court's remand order, while rejecting most of the Liquidator's arguments in support of his remand motion, concluded that it was proper to abstain from exercising jurisdiction over this case under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The District Court emphasized that a central issue in this case is Allstate's defense of set-off, i.e., that Allstate is entitled to set off balances due it from Mission against the balances the Commissioner seeks to recover on Mission's behalf. Noting that this issue was controlled by state law and that the Los Angeles Superior Court had developed an "intimate familiarity" with the law in this area, the District Court concluded that *Burford* abstention was warranted.

Allstate timely appealed from the remand order. Allstate's notice of appeal prayed that, in the event the appeal were found not to lie, it be treated as a petition for writ of mandamus. After the parties' opening briefs had been filed, the Insurance Commissioner moved for an order dismissing the appeal and peremptorily denying the petition for writ of mandamus on the ground that no abuse of discretion could be shown. The Ninth Circuit denied the motion to dismiss, noting that "[b]ecause the remand order was not based on jurisdictional grounds, the prohibition on appellate review imposed by 28 U.S.C. § 1447(d) does not apply." February 14, 1992 Order (attached as Appendix 1) at 1-2 (citing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52 (1976)). The Ninth Circuit's order did not resolve the question of whether review was available by appeal or mandamus, referring this issue "to the merits panel for such consideration as it deems appropriate." *Id.* at p.2.

Oral argument was held before the Ninth Circuit on November 5, 1993. On February 2, 1995 the Ninth Circuit, in a unanimous opinion, reversed the order of remand. The

Ninth Circuit first concluded that Allstate's appeal from the remand order was proper. The Ninth Circuit noted that, in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11-13 (1983), this Court had held that some "orders declining to exercise jurisdiction may be appealable" under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.* Noting that *Moses H. Cone* held that "an order staying a federal action pursuant to abstention . . . qualifies as an appealable final collateral order," the Ninth Circuit concluded "that a remand order based on abstention" likewise is "a final collateral order that is reviewable on appeal." *Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, 353 (9th Cir. 1995).

Having found that the remand order was properly appealable, the Ninth Circuit then concluded that abstention was not appropriate in this case. Noting that the Commissioner merely sought to recover money damages on behalf of Mission and did not seek any equitable relief that might interfere with the ongoing proceedings for the liquidation of Mission, the Ninth Circuit concluded that abstention under *Burford* was not justified. Relying on the carefully chosen words of this Court's opinions in a series of *Burford* abstention cases, the court below concluded that *Burford* abstention — long recognized as a power of federal courts sitting in equity — should not be extended to simple actions at law for the recovery of money damages. Any other result, the Ninth Circuit concluded, would contravene the federal courts' "virtually unflagging" obligation to exercise the jurisdiction conferred upon them by the Constitution. 47 F.3d at 356 (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989)).

On February 16, 1995, the Commissioner filed a petition for rehearing and suggestion for rehearing *en banc*, arguing for the first time that the Commissioner in fact seeks equitable relief, namely a declaration of the parties'

respective liability. On May 19, 1995, the Ninth Circuit denied rehearing. The Court's order noted that the Commissioner had not previously argued that its declaratory relief claim was equitable in nature and therefore could not be heard to raise this argument for the first time in a petition for rehearing. (See Pet. Cert., Appendix C.)

SUMMARY OF ARGUMENT

Neither of the issues on which the Liquidator urges this Court to grant review, Allstate submits, justifies intervention at this time by the nation's highest court. On the first issue identified by the Liquidator — the appealability of remand orders — there is substantial unanimity in the Courts of Appeals. In the wake of this Court's ruling in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52 (1976), the lower courts have uniformly recognized that many orders of remand — namely, those not based on defects in removal procedure — are subject to appellate review. The courts likewise are in agreement that at least some remand orders are reviewable by appeal, and not merely by mandamus. For instance, every Circuit Court to consider the issue has held that remand orders based on a forum selection clause contained in an agreement between the litigants represents a final order on a collateral matter permitting appeal under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The Liquidator argues, however, that the Circuit Courts are not fully in agreement on whether remand orders based on abstention qualify for appeal under the collateral order doctrine. The Ninth Circuit below held that they do, a ruling that seems compelled by this Court's holding in *Moses H. Cone* that an order *staying* a federal court suit based on abstention is a final, appealable order. With considerable reluctance, the Second Circuit seven years ago reached a contrary conclusion, expressly noting that it felt

bound to follow earlier circuit precedent that seemed inconsistent with the holding in *Moses H. Cone*. *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31 (2d Cir. 1988). More recently, in *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993), the First Circuit held that a particular abstention-based remand order was not appealable, notwithstanding the holding of *Moses H. Cone*. But the First Circuit went out of its way to note that "there is no absolute rule either prohibiting or permitting immediate appellate review of remand-related orders under the *Cohen* rubric," and that "courts must apply the multi-pronged *Cohen* test to each remand order (or, at least, to each *type* of remand order) in an individualized, case-specific manner." 6 F.3d at 862 (emphasis in original). Thus, in future First Circuit decisions, many and perhaps all abstention-based remand orders may be found to be appealable on their particular facts.

The other issue the Liquidator urges as a basis for granting review is whether the Ninth Circuit correctly held that *Burford* abstention does not apply in garden-variety civil damages actions like this one. For several reasons, this issue does not afford a basis for intervention by this Court at the present time. As a starting point, the Liquidator would not have the Court even reach this issue, since the Liquidator contends that Allstate should not have been permitted to appeal from the remand order. To the extent, therefore, there is any merit to the appealability issue, it casts doubt on whether the Court would be called upon even to consider the seemingly weightier issue of whether *Burford* abstention should be extended to garden-variety civil damages actions.

In any event, as demonstrated below, the Ninth Circuit's holding on the abstention issue is compelled by a series of decisions by this Court, culminating in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"). The essence of the *Burford* abstention doctrine is that in exceptional cases a

federal court may decline to exercise its jurisdiction to avoid improperly interfering with proceedings or orders of state administrative agencies. Where the only relief sought is an award of money damages, there can be no appreciable risk of any such interference. This case, indeed, amply demonstrates the point. The only impact this litigation can have on Mission's insolvency proceedings is that if the Commissioner prevails there will be marginally more money to distribute to Mission's creditors than otherwise would be the case.

Moreover, the Ninth Circuit's ruling with respect to the scope of the *Burford* extension doctrine is precisely the sort of issue that should be allowed to percolate at the lower court level for the present time. Since this Court's decision in *NOPSI*, the Ninth Circuit has held that *Burford* abstention generally does not apply in actions at law. Two District Courts have reached the same conclusion, and two other circuits — the First and Third — have at least expressed their strong inclination to the same view. Opposing these authorities is a single paragraph at the end of a recent Eighth Circuit decision, in which that Court of Appeals questioned the wisdom of limiting *Burford* to equitable proceedings. The principal basis for the Eighth Circuit's holding, however, was that the action arose under ERISA, and therefore could not be readily classified as legal or equitable in nature.

Future doctrinal developments at the lower court level may yield substantial or even complete unanimity among the circuits on the scope of *Burford* abstention. Moreover, the factual contexts in which this issue will arise in the future will provide a suitable proving ground for testing the impact and wisdom of the Ninth Circuit's holding. Allstate expects that future developments will show the wisdom of circumscribing the *Burford* abstention doctrine within the equitable arena. But if developments turn out otherwise and

the circuits fail to reach accord on the scope of this abstention doctrine, there will be ample opportunity at that time for this Court to intervene.

ARGUMENT

I.

THE DISTRICT COURT'S REMAND ORDER WAS A COLLATERALLY FINAL ORDER WHICH GAVE RISE TO A RIGHT OF APPEAL

The first ground urged by the Liquidator in support of the Petition for Certiorari arises from the Ninth Circuit's holding that the District Court's order of remand is appealable under the collateral order doctrine. For several reasons, Allstate submits, this holding does not present a basis for granting review.

On its face, 28 U.S.C. § 1447(d) seems to preclude appellate review of remand orders. That section provides that such orders are "not reviewable on appeal or otherwise." However, since this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52 (1976), it has been settled that "only remand orders issued under [28 U.S.C.] § 1447(c) and invoking the grounds specified therein — that removal was improvident and without jurisdiction — are immune from review under § 1447(d)." *Id.* at 346. Allstate knows of no decision, and the Liquidator cites none, even suggesting that a remand order based on abstention is one issued under section 1447(c) which is immune from all forms of appellate review.

Thus, the only issue of potential controversy here is whether remand orders based on abstention are reviewable by appeal, and not merely by mandamus. As the Court of Appeals noted below, in *Thermtron* this Court initially suggested that mandamus was the appropriate means of

appellate review in such circumstances. 47 F.3d at 353, citing *Thermtron*, 423 U.S. at 352-53. As the Ninth Circuit went on to note, however, this Court later recognized — in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) — that some orders of abstention may properly be appealed as final orders under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). 47 F.3d at 353.

In *Moses H. Cone*, this Court held that an order staying a federal case on the basis of *Colorado River*⁸ abstention was directly appealable. 460 U.S. at 9-13. The Court reasoned that “a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum,” and therefore the defendant was “‘effectively out of [federal] court.’” 460 U.S. at 10-11 (quoting *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962)). As a result, the Court concluded, the order of stay was a final order appealable under 28 U.S.C. § 1291. 460 U.S. at 13.

The stay order in *Moses H. Cone* also qualified for appeal, the Court held, under the *Cohen* collateral order doctrine. The Court noted that the factors “required to show finality” under the *Cohen* rule are as follows:

To come within the ‘small class’ of decisions excepted from the final judgment rule by *Cohen*, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action,

⁸*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

and [3] be effectively unreviewable on appeal from a final judgment.

460 U.S. at 11-12 (quoting *Coopers & Lybrand v. Livesay* 437 U.S. 463, 468 (1978) (footnote omitted)). The stay order, this Court concluded, met each of these three requirements.

As the Ninth Circuit observed, an order of remand even more clearly satisfies the three prongs of the *Cohen* test. Indeed, if anything a remand order more clearly puts the parties “effectively out of federal court” than does an order merely *staying* the federal proceeding. Likewise, when *Burford* abstention is invoked in a lawsuit commenced in a federal court, it typically results in an order of dismissal,⁹ which then is appealable as a final order under 28 U.S.C. § 1291. Thus, it would be anomalous at best if an order of remand based on abstention were not reviewable by appeal, when equivalent abstention rulings resulting in stay or dismissal are directly appealable.

It therefore comes as no surprise that the Ninth Circuit, relying principally on *Moses H. Cone*, concluded that the District Court’s remand order here gave rise to a right of appeal under the collateral order doctrine. The Ninth Circuit’s ruling finds considerable support in previous rulings, both within the Ninth Circuit and by other circuits, dating back more than a decade. In *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), the Court of Appeals held that a remand order based on a “substantive decision on the merits apart from any jurisdictional decision” — namely, the enforceability of a forum selection clause contained in a contract between the parties — is appealable under 28 U.S.C. § 1291 as a collaterally

⁹See generally E. Chemerinsky, *FEDERAL JURISDICTION* § 12.3 at 612 (1989) (*Burford* abstention “requires the federal court to dismiss the case”).

final order. 741 F.2d at 276. Several other circuits have endorsed this rule. See *McDermott Int'l v. Lloyds Underwriters of London*, 944 F.2d 1199, 1203 (5th Cir. 1991) ("we review the district court's remand order, which the court issued pursuant to [a forum selection clause in] the parties' contract, on appeal under *Cohen's* collateral order doctrine"); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir.), cert. denied, 502 U.S. 908 (1991) ("an order remanding a case pursuant to a forum selection clause is 'final' for purposes of . . . the collateral order doctrine"); *Regis Assocs. v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990) (appeal lies from order remanding action based on forum selection clause, under rule that "a remand order is reviewable on appeal when it is based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction"). Most recently, the Eighth Circuit — permitting a direct appeal from an order declining to lift a previously-imposed stay on federal proceedings — broadly held that "a federal court order abstaining because of a parallel state proceeding . . . is appealable under the collateral-order doctrine." *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 144 (8th Cir. 1995). This holding is not without a touch of irony here, since *Wolfson* is the decision on which the Liquidator principally relies in urging this Court's review of the Ninth Circuit's ruling on the merits of whether abstention was proper in this case.

The Liquidator contends that two decisions — one in the First and the other in the Second Circuit — are not in accord with the foregoing views, and that this divergence supports the grant of certiorari.¹⁰ The Second Circuit deci-

¹⁰The Liquidator does not rely on two other decisions which, discussing the issue only briefly, conclude that remand orders based on abstention are reviewable by mandamus rather than appeal. *Pas v. Travelers Ins. Co.*, 7 F.3d 349, 353 (3d Cir. 1993); *Melahn v. Pennock*

sion on which the Liquidator relies, *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31 (2d Cir. 1988), did hold that a remand order based on abstention should be reviewed by mandamus rather than appeal. 842 F.2d at 34-35. It has been questioned whether this ruling was consistent with another Second Circuit case, *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988), allowing a direct appeal from a remand order based on a forum selection clause.¹¹ And in *Corcoran v. Ardra*, the Second Circuit regarded the kind of suit before it as presenting a powerful case for the review by appeal that it felt reluctantly bound not to allow. As the Second Circuit stated: "Under the surrender-of-federal-jurisdiction test used in *Moses Cone*, we wonder whether it can logically or prudently remain the rule that a reviewable remand order (*i.e.*, one whose review is not barred by § 1447(d)) is not reviewable by direct appeal." 842 F.2d at 34.

Moreover, the most recent Second Circuit decision on point appears to limit *Corcoran v. Ardra* to its facts. In *Minot v. Eckardt-Minot*, 13 F.3d 590 (2d Cir. 1994), the Second Circuit permitted a direct appeal from an abstention-based order of remand, issued because related child custody issues were pending in state court. See 13 F.3d at 593. The Second Circuit found that *Corcoran v. Ardra* did not compel a different result, since "*Corcoran* explained that when a district court's remand conclusively determines a

Ins., Inc., 965 F.2d 1497, 1500-01 (8th Cir. 1992). Both decisions base their ruling on *Thermtron*, failing to address this Court's later holding in *Moses H. Cone* that stay orders based on abstention are appealable. Thus, as the Liquidator appears to recognize, neither decision can be said to present a meaningful conflict with the Ninth Circuit's decision below.

¹¹See *McDermott Int'l v. Lloyds Underwriters of London*, 944 F.2d at 1203 n.5 ("We think that *Corcoran v. Ardra* was wrongly decided . . . [T]he *Corcoran* court did not adequately distinguish *Karl Koch Erecting Co.* . . .").

collateral question (such as where the merits of a litigation will be resolved), that decision is appealable under the collateral-order doctrine." *Id.* The court concluded that "[s]ince the remand order in this case conclusively determined that a state court would decide the merits of the underlying dispute, direct appeal of the remand decision is appropriate." *Id.* Based on this language, it seems clear that the Second Circuit would have allowed an appeal in the present case, just as the Ninth Circuit did.¹²

The only other decision on which the Liquidator relies is *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993). As a practical matter, it is far from clear that *Doughty* represents any actual conflict with the Ninth Circuit. *Doughty* first holds that a remand order is not a "final order" under 28 U.S.C. § 1291, a question not reached by the Ninth Circuit, which held only that an abstention-based remand order is appealable as a collaterally final order under *Cohen*. Compare *Doughty*, 6 F.3d at 860-62 with *Garamendi*, 47 F.3d at 353. While *Doughty* ruled that the remand order before the court did not qualify for direct appeal under the collateral order doctrine, the

¹²The Second Circuit apparently found *Corcoran v. Ardra* distinguishable because the defendants there had removed the action on the basis of 9 U.S.C. § 205, which permits removal of any state court action relating to "an arbitration agreement or award falling under the [Foreign Arbitral Awards] Convention," and the federal court had not ruled on the question of whether the defendants were entitled to compel arbitration under the Convention. Thus, the remand order in *Corcoran v. Ardra* "return[ed] to the state court the threshold question of where the underlying dispute is to be decided." *Minot*, 13 F.3d at 593 n.1. Although Allstate also seeks to compel arbitration, Allstate removed the present case on the basis of diversity jurisdiction, not 9 U.S.C. § 205. Thus, there is an independent basis for federal jurisdiction here unrelated to Allstate's motion to compel arbitration. On these facts, it seems clear that the Second Circuit would recognize a right of appeal from an abstention-based remand order.

First Circuit did not adopt a blanket rule that such orders never are appealable. Instead, the First Circuit held that:

[T]here is no absolute rule either prohibiting or permitting immediate appellate review of remand-related orders under the *Cohen* rubric. . . . Rather, courts must apply the multi-pronged *Cohen* test to each remand order (or, at least, to each *type* of remand order) in an individualized, case-specific manner.

Id. at 862 (emphasis in original).

This holding leaves open the substantial possibility that, in practice, the First Circuit may permit subsequent appeals in remand orders based on abstention, as application of the three-part *Cohen* test may dictate in a given case. As a practical matter, therefore, the First Circuit's decision may represent no departure, or only a minimal departure, from the views expressed by the Ninth Circuit panel. At a minimum, it would be prudent to await further doctrinal developments in the First Circuit, which will demonstrate the degree, if any, to which the decisions of the First and Ninth Circuits are in conflict.

Even if there were a conflict among the circuits regarding the appealability of abstention-based remand orders, that conflict would have little practical impact on the resolution of like cases. Whether review is had by appeal or by mandamus may not affect the ultimate outcome at the appellate level. In the Ninth Circuit, for instance, decisions to abstain — once the "requirements for the abstention doctrine being invoked" are met — are reviewed on appeal for abuse of discretion. *Garamendi*, 47 F.3d at 354. An abuse of discretion standard is also employed in mandamus review. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). In either case, the courts have recognized that a substantially heightened abuse of discretion standard should apply.

In light of the obligation of the federal courts to exercise the jurisdiction conferred on them except in the most exceptional cases, "there is little or no discretion to abstain in a case which does not meet traditional abstention requirements." *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 540 (9th Cir. 1985) (quoting *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983)); accord *University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265, 269-70 (3d Cir. 1991) ("The determination of whether this case falls in the area within which the district court may exercise discretion [to abstain] is therefore a matter of law, reviewable on a plenary basis.") Thus, even if the Circuit Courts eventually diverge on the question of whether remand orders based on abstention are reviewable by appeal or only by mandamus, this does not necessarily betoken any material disparity in the resolution of the ultimate issue presented — namely whether abstention was proper.

It is to that question that Allstate now turns.

II.

THE NINTH CIRCUIT'S ABSTENTION ORDER IS CONSISTENT WITH THIS COURT'S PREVIOUS RULINGS AND WITH THE CURRENT TREND IN THE CASELAW.

The starting point for any examination of whether a District Court should abstain from hearing a dispute within the jurisdiction conferred upon it is to recognize that abstention is an extraordinary step that can be justified only in very rare circumstances. This Court has emphasized the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conser-*

vation Dist. v. United States, 424 U.S. 800, 817 (1976). This Court likewise has held:

The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.

Moses H. Cone, 460 U.S. at 14 (quoting *Colorado River*, 424 U.S. at 813).

Moses H. Cone also established another controlling principle: "[T]he presence of federal law issues must always be a major consideration weighing against surrender" of jurisdiction by the federal district court. 460 U.S. at 26. This observation could hardly be of more obvious import here, since the federal law issue present in *Moses H. Cone* is the identical federal law issue presented here — whether arbitration of the plaintiff's claims must be ordered under the Federal Arbitration Act.

The fact that Allstate removed this case based on the federal court's diversity jurisdiction is also a relevant factor in addressing the *Burford* abstention issue. First, this case is a paradigmatic one for invocation of diversity jurisdiction: Allstate is an out-of-state defendant which prefers to litigate against a state official in federal rather than state court.¹³

¹³ See R. Jacks, *Arbitration & Insurer Insolvencies: The Triumph of Common Sense Over Abstract Principle*, in ABA NATIONAL INSTITUTE ON INSURER INSOLVENCY, LAW & PRACTICE OF INSURANCE COMPANY INSOLVENCY at 260, 261 (1986) ("state rehabilitators and liquidators prefer to resolve disputes between insurers and their reinsurers in a friendly forum where they can expect to be treated with something more than normal deference"); Spector, *When Your Rein-*

The grant of diversity jurisdiction gave Allstate the right to choose between these forums. Second, the fact that the Liquidator's claims arise under state law does not distinguish this case from any other diversity action, and therefore by itself affords no basis for abstention. Federal courts decide state law issues, clear and unclear, in every diversity case. As this Court recently reaffirmed, "[a]pplication of the 'State law' to the present case . . . does not present the disputants with duties difficult or strange." *Salve Regina College v. Russell*, 499 U.S. 225, 227 (1991) (quoting *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208-09 (1938)). In fact, a body of jurisprudence has developed specifically to aid the federal courts in determining how, in the absence of a controlling state court decision, the highest court of the state would resolve a particular legal issue. See generally 19 C. Wright, A. Miller, & E. Cooper, *FEDERAL PRACTICE & PROCEDURE: JURISDICTION* § 4507 (1982).¹⁴

While the foregoing principles formed the backdrop for the Ninth Circuit's opinion below, an equally fundamental premise was the gist of its ruling. As the Ninth Circuit observed, this Court's decisions supporting abstention under *Burford* have confined that abstention doctrine to equitable proceedings rather than actions at law for the recovery of money damages. In an opinion that even the Liquidator acknowledges was "narrowly focused" (Pet. Cert. at 11),

Insurance Partner Goes Bust, in *BEST'S REVIEW: PROPERTY-CASUALTY INS. ED.* (1986) (noting that in lawsuits to recover balances due insolvent insurers, "liquidators enjoy an enormous home field advantage" in their own state courts).

¹⁴For instance, more than 50 years ago this Court instructed that: Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

West v. American Tel. & Tel. Co., 311 U.S. 223, 237 (1940).

the Ninth Circuit found that abstention was improper because "the power of federal courts to abstain from exercising their jurisdiction, at least in *Burford* abstention cases, is founded upon a discretion they possess only in equitable cases." 47 F.3d at 355-56.

The Liquidator urges this Court to review this holding based on an inter-Circuit conflict allegedly created by a single decision: *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995). *Wolfson* involved an appeal from a District Court order declining to lift a stay on an ERISA action against an insolvent insurer. The plaintiff, Wolfson, sought to recover benefits due under an employee welfare benefits plan established by the defendant insurer. The insurer was placed into rehabilitation proceedings, leading the District Court to stay the ERISA action. The Eighth Circuit affirmed the stay, finding both *Burford* and *Colorado River* abstention principles to support such a ruling. See 51 F.3d at 145.

In so holding, the Eighth Circuit emphasized that the action was one against the insolvent insurer which sought "to establish a claim against the assets being administered by the state court." 51 F.3d at 146. The court distinguished a separate category of cases — ones like the present action against Allstate "in which the insolvent insurer or its receiver has asserted a claim in the federal action which, if successful, will enhance the insolvent's estate." *Id.* at 145. The Eighth Circuit noted that it had recently "refused to abstain" in such a case because, among other grounds, "adjudication of that claim in federal court would neither interfere with the receiver's control of the insolvent nor frustrate in any way the state's interests in the insolvency proceeding." *Id.* (citing *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1506-07 (8th Cir. 1992)).

Thus, *Wolfson* unambiguously supports the result reached by the Ninth Circuit below. Nor does *Wolfson*

present a significant doctrinal conflict with the Ninth Circuit's decision. *Wolfson's* only discussion of whether *Burford* abstention should be extended to civil damages actions came in a single paragraph at the end of the opinion, in which the court observed:

We think it unwise to make rigid distinctions between legal and equitable claims in the merged federal system, particularly for claims such as those under ERISA whose historical antecedents are unclear. No doubt abstention is less apt to be appropriate when the federal plaintiff seeks money damages, but we do not read the Supreme Court's abstention jurisprudence as completely foreclosing abstention in money damage cases.

Id. at 147 (citation omitted).

These brief observations hardly afford a basis for this Court's intervention. To begin with, as already seen, *Wolfson* affirms the Eighth Circuit's rejection of *Burford* abstention in most civil damages actions by liquidators of insolvent insurers, the kind of case presented here. Thus, *Wolfson* and *Garamendi v. Allstate* do not present an instance of like cases being decided differently, one hallmark of Supreme Court review.

Moreover, as the above-quoted language makes clear, the Eighth Circuit's holding emphasizes the fact that the claim before it arose under ERISA, and that such statutory claims cannot readily be classified as legal or equitable in nature. To this extent, *Wolfson* does little more than suggest a possible corollary to the *Garamendi v. Allstate* holding, namely that *Burford* abstention might apply in cases that defy ready definition as equitable or legal. It remains to be seen whether the Ninth Circuit will embrace such a corollary, or instead will strictly apply an "equity only" rule. The

Ninth Circuit had no occasion to consider that issue here, since this case is clearly one at law.

Likewise, it largely remains to be seen how other Courts of Appeals will rule with respect to the application of *Burford* abstention in legal, equitable, and statutory proceedings. To the extent other circuits have addressed this issue in the wake of *NOPSI*, they all seem to be in accord with the Ninth Circuit's ruling in *Garamendi*, as the Ninth Circuit noted below. *See* 47 F.3d at 356; *see also* *See Fragoso v. Lopez*, 991 F.2d 878, 882 (1st Cir. 1993) (in a commercial tort action, "we think it is highly questionable whether the court is one 'sitting in equity' to which *Burford* abstention might be available") (footnote omitted); *University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265, 271 (3d Cir. 1991) (rejecting *Burford* abstention on the ground, among others, that "[h]ere, unlike *Burford* and the other Supreme Court cases involving the *Burford* doctrine, the action was at law, not in equity, and sought money damages"); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 270 (D. Vt. 1993) (holding that *Burford* abstention is inappropriate in action between reinsurer and state insurance commissioner, as liquidator of insolvent insurer, since "the *NOPSI* distillation limits abstention under *Burford* to courts sitting in equity"); *Duane v. Government Employees Ins. Co.*, 784 F. Supp. 1209, 1223 (D. Md. 1992) (same).

That the weight of authority so strongly inclines toward limiting *Burford* abstention to equitable proceedings can be readily explained: This Court's opinions, culminating in *NOPSI*, dictate precisely such a conclusion. The Ninth Circuit traced the evolution of this Court's decisions, *see* 47 F.3d at 354-56, and there is no need to repeat that discussion in detail here. As the Ninth Circuit noted, *see* 47 F.3d at 355, *Burford* itself made it clear that the abstention

doctrine it announced was to be applied in equitable proceedings:

Although a federal *equity court* does have jurisdiction of a particular proceeding, it may, in its sound discretion . . . refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.

319 U.S. at 317-18 (quotation marks and citations omitted; emphasis supplied). See also *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 350-51 (1951) ("a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer") (emphasis supplied; quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-98 (1943)).

As the Ninth Circuit noted, this Court has expanded some abstention doctrines to "special" classes of damages cases. See *Garamendi*, 47 F.3d at 355 & n.11. But any ambiguity regarding the application of *Burford* abstention to run-of-the-mill damages actions such as the present case was laid to rest in *NOPSI*. There, New Orleans Public Service, Inc. was challenging a utility ratemaking order of the New Orleans City Council. The Council's order partially denied NOPSI's request for a rate increase to reflect costs incurred in construction of a nuclear reactor. NOPSI filed a state court lawsuit for review of the ratemaking order. It also filed a parallel federal court lawsuit, seeking declaratory and injunctive relief on the ground that the order was preempted by federal law providing for oversight by the Federal Energy Regulatory Commission of the cost allocation. The District Court abstained under *Burford* and *Younger v. Harris*,¹⁵ and the Fifth Circuit affirmed. This Court reversed, holding that — whatever the state's interest in the outcome of the pro-

¹⁵401 U.S. 37 (1971).

ceeding — the federal court action simply did not present the potential interference with state administrative proceedings to justify federal court abstention. 491 U.S. at 372-73.

Most important for present purposes was *NOPSI*'s delineation of the parameters of *Burford* abstention. The Court's re-articulation of the *Burford* abstention doctrine began with the observation that "a federal court *sitting in equity* must decline to interfere with the proceedings or orders of state administrative agencies" when the requisites for *Burford* abstention are otherwise met. 491 U.S. at 361 (emphasis supplied). See also *id.*, 491 U.S. at 360 (noting that in *Burford*, this Court concluded that "the exercise of *equitable* jurisdiction by comparatively unsophisticated Federal District Courts" should be declined) (emphasis supplied).

More fundamentally, this Court in *NOPSI* emphasized that the *Burford* abstention doctrine — as a narrow exception to the "‘virtually unflagging’" obligation of the federal courts "to adjudicate claims within their jurisdiction"—merely confers

discretion in determining whether to grant *certain types of relief*. . . . Thus, there are some classes of cases in which the withholding of authorized *equitable relief* because of undue interference with state proceedings is the 'normal thing to do.'

Id., 491 U.S. at 359 (citations omitted; quoting *Younger v. Harris*, 401 U.S. 37, 45 (1971)). Such discretion has no application in a typical action at law, in which the only relief sought is an award of money damages.

Instead, civil damages actions simply do not afford a basis for a federal court to abstain from exercising its jurisdiction under *Burford*. As this Court emphasized in *NOPSI*, the fundamental principle underlying *Burford* abstention is one of avoiding undue interference with state

administrative proceedings or orders. See 491 U.S. at 361-62. For instance, in *Burford*, there was an impermissible danger of federal interference because the federal court was being asked to disapprove the Texas Railway Commission's administrative approval of a permit to drill four oil wells, when the state had developed "its own elaborate review system for dealing with the geological complexities of oil and gas fields." *Colorado River*, 424 U.S. at 815 (discussing *Burford*, 319 U.S. at 326).

Thus, in *Burford*, the federal court's intervention threatened to overturn the state Railway Commission's attempt to maintain an intricate balance in the allocation of drilling rights. That risk is simply absent in a typical lawsuit for damages. No such improper interference would have been presented, for instance, if the Texas Railway Commission had filed a civil damages action in federal court, as the receiver of an insolvent drilling company, to recover payments due from third parties. This, of course, is just what the Liquidator seeks to do here.

CONCLUSION

The Petition for Certiorari fails to show facts that justify intervention by this Court. There is substantial unanimity among the circuits on the appealability of remand orders in general, and it is uncertain to what extent there is any conflict regarding the appealability of abstention-based remand orders specifically. Indeed, pending further developments in the First Circuit, it may turn out that in practice there is no divergence among the lower courts on this issue.

If the Liquidator's position on appealability of the remand order were correct, this Court would never even reach the other issue on which this Court's review is urged — the more substantive issue of whether *Burford* can justify abstention in this straightforward commercial damages action. For this reason alone, this case is not an appropriate

vehicle for reviewing the *Burford* issue. Moreover, the recent decisions in this area again reflect substantial unanimity among the lower courts. Only the Eighth Circuit's decision in *Wolfson* might be said to depart from the prevailing view. But the *Wolfson* court was careful to limit its holding to ERISA cases against the insolvent insurer, as opposed to actions at law filed by the insolvent insurer's liquidator to recover monies on the insolvent's behalf. It is a telling point that *Wolfson* — in acknowledging that *Burford* affords no basis for abstaining from civil collection actions filed on behalf of insolvent insurers — actually supports the result reached by the Ninth Circuit below.

The Liquidator's Petition for Certiorari should be denied.

DATED: September 11, 1995

Respectfully submitted,

MUNGER TOLLES & OLSON
JOSEPH D. LEE

*Attorneys for Respondent
Allstate Insurance Company*

APPENDICES

APPENDIX 1

MEMORANDUM TO CLERK

I certify that the judges concerned concur in this order and authorize its filing.

WILLIAM A. NORRIS
United States Circuit Judge

No. 91-55855

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN GARAMENDI,* Insurance Comm. of
the State of California, in his capacity as liquidator of
MISSION INSURANCE COMPANY, et al.,
Plaintiff-Appellee,

vs.

A. STATE INSURANCE,
Defendant-Appellant,
and

INSURANCE COMPANY OF NORTH AMERICA,
Defendant.

Filed February 14, 1992

Cathy A. Catterson, Clerk, U.S. Court of Appeals

DC# CV-90-4713-WMB
Central California

ORDER

Before: NORRIS and LEAVY, Circuit Judges

*John Garamendi has been substituted for Roxani Gillespie pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure.

Appellant's motion for an extension of time within which to file opposition to appellee's motion to dismiss the appeal is granted. The opposition shall be filed as of January 22, 1992, the date it was received.

This appeal arises from an order remanding on abstention grounds. Because the remand order was not based on jurisdictional grounds, the prohibition on appellate review imposed by 28 U.S.C. § 1447(d) does not apply. See *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52. Accordingly, the motion to dismiss is denied. However, because it is not clear whether this appeal should be more properly treated as a petition for writ of mandamus, we refer the papers filed in connection with the motion to dismiss for lack of jurisdiction to the merits panel for such consideration as it deems appropriate.

Appellant's opening brief and appellee's answering brief have been filed. The due date for the reply brief set out in this court's November 6, 1991 order is vacated. The reply brief shall be due 14 days from the date of this order. This appeal is ready for calendaring.

APPENDIX 2

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

FEDERAL ARBITRATION ACT
9 U.S.C. §§ 1-16

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the

making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved

may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made

may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may

make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16. Appeals

(a) An appeal may be taken from —

(1) an order —

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order —

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

4
No. 95-244

Supreme Court, U. S.
FILED

SEP 18 1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE
COMPANY TRUST, MISSION NATIONAL INSURANCE
COMPANY TRUST, ENTERPRISE INSURANCE COMPANY
TRUST, HOLLAND-AMERICA INSURANCE COMPANY
TRUST and MISSION REINSURANCE CORPORATION TRUST,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. AS TO THE APPELLATE REVIEW OF RE- MAND ORDERS	3
III. AS TO THE PROPRIETY OF ABSTENTION..	5
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
<i>Ankenbrandt v. Richards</i> , 504 U.S. 689 (1992)	6, 7
<i>California State Auto. Ass'n Inter-Insurance Bureau v. Maloney</i> , 341 U.S. 105 (1951)	9
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949)	4
<i>Colorado River Water Conservation District v. United States</i> , 424 U.S. 800 (1976)	6
<i>Corcoran v. Ardra Ins. Co.</i> , 842 F.2d 31 (2d Cir. 1988)	3, 6
<i>Doughty v. Underwriters at Lloyd's, London</i> , 6 F.3d 856 (1st Cir. 1993)	4, 5
<i>General Glass Industries Corp. v. Monsour Medical Foundation</i> , 973 F.2d 197 (3rd Cir. 1992)	6
<i>German Alliance Ins. Co. v. Lewis</i> , 233 U.S. 389 (1914)	9
<i>Gonzalez v. Media Elements, Inc.</i> , 946 F.2d 157 (1st Cir. 1991)	6
<i>Hartford Cas. Ins. Co. v. Borg-Warner Corp.</i> , 913 F.2d 419 (7th Cir. 1990)	6
<i>Louisiana Power & Light Co. v. City of Thibodaux</i> , 360 U.S. 25 (1959)	6, 7
<i>Minot v. Eckardt-Minot</i> , 13 F.3d 590 (2d Cir. 1994)	3, 6, 7
<i>Osborn v. Ozlin</i> , 310 U.S. 53 (1940)	9
<i>Riley v. Simmons</i> , 45 F.3d 764 (3rd Cir. 1995)	6
<i>Thermtron Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336 (1976)	3
<i>United States Department Of The Treasury v. Fabe</i> , 508 U.S. —, 113 S. Ct. 2202 (1993)	9
<i>Warmus v. Melahn</i> , 62 F.3d 252 (8th Cir. 1995)	7
<i>Wolfson v. Mutual Benefit Life Ins. Co.</i> , 51 F.3d 141 (8th Cir. 1995)	5, 6
Statutes	
15 U.S.C. § 1011-15	9
28 U.S.C. § 1291	5
28 U.S.S. § 1447(d)	3
Other	
Shapiro, David L., <i>Jurisdiction And Discretion</i> , 60 N.Y.U.L. Rev. 543 (1985)	6

IN THE
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CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
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On Petition for Writ of Certiorari to the
United States Court of Appeals
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PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION

The Commissioner respectfully submits this reply to Allstate's Brief In Opposition To Petition For Writ Of Certiorari (the "Opposition").

I. INTRODUCTION.

The questions presented in this case are important and have a universal impact. The issue of when a district court's order is immediately appealable raises substantial questions of finality and the proper use of appellate re-

sources. The abstention issues profoundly affect not only all insurance insolvency proceedings, but also the federal courts' application of the abstention doctrine in general.

Allstate cannot deny that the decision of the Ninth Circuit in this case conflicts with prior decisions of this Court, nor can it deny there is a conflict in the circuit courts on both questions presented. Allstate merely attempts to play down the conflict in the circuits and to gloss over the conflicting precedents of this Court. At best, Allstate's opposition simply underscores the confusion and uncertainty that is created by the Ninth Circuit decision and by the conflict among the circuit courts as to both of the questions presented: (i) the question of the appealability of remand orders under the collateral order doctrine and (ii) the question of whether the abstention powers of federal courts are limited to actions in equity, or alternatively, whether *Burford* abstention is limited solely to actions in equity.

Regrettably, Allstate takes a rather cavalier attitude towards the confusion in the law by recommending to this Court that the issue of the fundamental nature of abstention doctrine should be "allowed to percolate at the lower court level for the present time."¹ Unlike coffee, the administration of justice, judicial federalism and comity do not necessarily benefit from continued percolation. Permitting the substantial rights of the insurance-buying public and the hundreds of thousands of insureds who are claimants in this and the many other insurance insolvencies now pending to percolate like so many coffee grounds for some indeterminate time, while millions of dollars are spent debating in multiple courts the very issues now presented to this Court hardly seems appropriate when this Court could grant the Commissioner's Petition and clear away the confusion now.

¹ Opposition, at 10.

II. AS TO THE APPELLATE REVIEW OF REMAND ORDERS.

Allstate concedes that, "On its face, 28 U.S.C. § 1447(d) seems to preclude appellate review of remand orders."² Allstate also effectively admits that *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31 (2d Cir. 1988), which is also an insurance insolvency case, is in conflict with the decision of the Ninth Circuit in this case.³ Although Allstate attempts to distinguish *Corcoran* from the more recent Second Circuit decision in *Minot v. Eckardt-Minot*, 13 F.3d 590 (2d Cir. 1994), this attempt is not persuasive, particularly in view of Allstate's concession, buried in its footnote 12,⁴ that there is an open issue as to arbitration in this case. This open issue, if nothing else, prevents the remand order from being final and appealable under either *Corcoran* or *Minot*.

In *Corcoran*, the threshold issue of where the case would be tried was undecided and returned to the state court. On that basis the court held the remand order was not final and not appealable.⁵ The instant case involves exactly the same issue; Allstate's assertion of the right to arbitration,⁶ a threshold issue that was not determined by the remand order of the district court and that is yet to be decided by any court. Accordingly, this remand order would not be appealable in the Second Circuit. This conclusion is also dictated by the decision in

² Opposition, at 11.

³ Opposition, at 14-15.

⁴ Opposition, at 16, fn. 12.

⁵ The *Minot* court specifically stated "Conversely, when a district court's remand order does not determine the forum in which the dispute will ultimately be decided . . . a petition for mandamus is the only way to obtain appellate review." *Minot*, 13 F.3d at 593, n.1. This is completely consistent with the Commissioner's position and is in direct conflict with the Ninth Circuit.

⁶ Opposition, at 16, fn. 12.

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 352-353 (1976), where this Court stated "because an order remanding a removed action does not represent a final judgment reviewable by appeal, the remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

Allstate attempts to evade this conclusion by pointing out that it removed on diversity grounds as opposed to the grounds of arbitration.⁷ The distinction makes no difference. To hold that a remand order is or is not final based on the theory of removal, as opposed to the controlling question of whether there has been a conclusive determination, is merely another attempt to elevate form over substance. Regardless of the *grounds* for removal, the remand order in this case did not conclusively determine any issue, not even the basic issue of what forum would ultimately hear the underlying dispute. Accordingly, the remand order in this case was not a final order and could not be subject to appeal.

Allstate also admits that *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993) held that a remand order is not a final order under 28 U.S.C. § 1291.⁸ Allstate suggests that *Doughty* does not conflict with the Ninth Circuit decision in the instant case because the Ninth Circuit did not hold that a remand order is a "final order," but merely held that "an abstention-based remand order is appealable as a collaterally final order" under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).⁹ This weak attempt to draw a distinction slices the argument far too thin. Allstate apparently realizes this when it finally rests on the assertion that the holding in *Doughty* "leaves open the substantial possibility that, in practice, the First Circuit may permit sub-

⁷ *Id.*

⁸ Opposition, at 16.

⁹ *Id.*

sequent appeals in remand orders based on abstention" ¹⁰ Despite the fact that *Doughty* did hold that a remand order is *not* a final order under 28 U.S.C. § 1291, Allstate engages in the dubious speculation that in some future and hypothetical case the First Circuit *might* hold that an "abstention-based remand order" is a final order under 28 U.S.C. § 1291.¹¹ The remote possibilities of the future, however, do not erase the facts of the present.

III. AS TO THE PROPRIETY OF ABSTENTION.

Allstate presents no cogent argument to rebut the Commissioner's assertion that this case involves unique and important issues of judicial federalism. Allstate never asserts that the Ninth Circuit is correct in squarely holding that the very power to abstain is limited solely to cases of equity. Indeed, Allstate does not deny the Commissioner's point that Allstate never asserted this position, but only argued that the nature of the underlying action was *one* factor to be considered.¹²

Similarly, Allstate never responds to the Commissioner's argument or authority that it is inappropriate to base abstention doctrine on the ancient dichotomy between actions at law and equity,¹³ nor does Allstate even attempt to deal with the Commissioner's point that since the underlying controversy does involve actions in equity, this case is an ideal vehicle for testing the validity of the Ninth Circuit's holding.¹⁴

Along the same lines, other than *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995), Allstate makes no effort to discuss the conflict in the

¹⁰ Opposition, at 17.

¹¹ *Id.*

¹² See discussion in the Commissioner's Petition, at 22-23, that the Ninth Circuit granted a position not urged by Allstate.

¹³ See discussion in the Commissioner's Petition, at 23-26.

¹⁴ Petition, at 23-26.

Circuits on the nature of *Burford* abstention.¹⁵ Allstate does not even try to explain away the conflict presented by *General Glass Industries Corp. v. Monsour Medical Foundation*, 973 F.2d 197 (3rd Cir. 1992); *Riley v. Simmons*, 45 F.3d 764 (3rd Cir. 1995); *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991); or *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990).¹⁶

Minot, 13 F.3d 590, relied upon by Allstate in its fruitless effort to distinguish *Corcoran* on the reviewability issue, is not only supportive of the Commissioner on that issue, but also strongly supports the Commissioner on the abstention issue.¹⁷ The *Minot* decision represents an excellent example of why the equity-law distinction is of little use in making abstention decisions. The crucial point in *Minot* was that "[t]he underlying action is perhaps a paradigmatic example of a case presenting 'difficult questions of state law bearing on policy problems of substantial public import. . . .'" *Minot*, 13 F.3d at 593. That Court relied on *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) to abstain

¹⁵ Allstate seeks to distinguish *Wolfson* and even assert that it "unambiguously supports the result reached by the Ninth Circuit below," (Opposition, at 21) but makes no effort to explain away the fact that the *Wolfson* opinion expressly rejects the law-equity distinction made by the Ninth Circuit in the instant case. Moreover, Allstate makes no response to the argument in David L. Shapiro, *Jurisdiction And Discretion*, 60 N.Y.U.L. Rev. 543, 551-52 (1985), cited with approval by the Eighth Circuit in *Wolfson*, that the law-equity distinction is not a sound basis upon which to base abstention doctrine. Further, since *Wolfson* specifically mentions and rejects the Ninth Circuit's opinion in the instant case, it is impossible to accept the notion that the two do not conflict.

¹⁶ See discussion in the Petition, at 18.

¹⁷ *Minot* cites *Corcoran*, *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), and *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), among others, with approval on the abstention question. All of these cases support the Commissioner's position.

even though it characterized the underlying action as one where "Minot seeks recovery on theories akin to what has been called a 'tort of custodial interference.'" *Id.* at 594. The court in *Minot* then drew a parallel to *Ankenbrandt* which suggested that, in certain circumstances, abstention on *Burford* grounds in a family law dispute is appropriate. *Id.* at 594-95.

Allstate has simply provided one more example of a case in which the law-equity dichotomy was disregarded in making an abstention determination, thereby emphasizing the conflict between the Ninth Circuit on the one hand and this Court and certain circuit courts on the other.¹⁸

Further, Allstate studiously ignores the decisions in which this Court applied the abstention doctrine to cases in which the underlying matter was not solely an action in equity. These decisions conflict with the Ninth Circuit's fundamental rationale, yet Allstate cannot explain these away,¹⁹ or provide a reason for this Court to retract its statement in *Thibodaux*, 360 U.S. at 28, that, "These prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism."

Rather than meeting the conflicting decisions and the underlying rationale head-on, Allstate attempts to sidestep and characterize this case as a mere collection action, which it is not. Indeed, Allstate never actually denies nor responds to the Commissioner's discussion as to why this is not a mere collection case.²⁰ For example, Allstate has nothing to say about the fact that it filed claims

¹⁸ See the discussion in Section B of the Petition, at 19-22, where this Court's own refusal to be backed into an illogical corner based upon the out-dated law-equity distinction is discussed. See also the very recent case of *Warmus v. Melahn*, 62 F.3d 252, 255 (8th Cir. 1995) in which the Eighth Circuit rejected the argument that *Younger* abstention could not be applied in a case involving only monetary relief.

¹⁹ See discussion in the Petition, at 19-22.

²⁰ See, e.g., Petition, at 3-11, 22-23.

in the receivership proceeding, pursuant to state statutes and orders of the Receivership Court, by which claims it asserts the exact offset claims asserted as affirmative defenses in the instant suit. Allstate does not address the point that failure to remand to the Receivership Court will permit Allstate voluntarily to file claims in the state receivership proceedings and then remove the adjudication of those claims to federal court, thereby evading the governing state statutes and the exclusive jurisdiction of the state Receivership Court. Allstate has no argument against the Commissioner's position that to permit claimants to remove receivership claims to various federal courts would be contrary to and disruptive of the state statutory scheme and would effectively plunge the state court proceedings into chaos. This would violate important principles of federalism and comity.

Allstate argues that the fact that this action was removed on diversity grounds should be the controlling factor in the abstention analysis.²¹ This argument is not only without legitimate foundation, it actually demonstrates the fundamental evil to be avoided. In the instant case and all other complex insurance insolvency cases, the claimants reside in many states and foreign countries. If diversity jurisdiction is to be made the springboard to permit these claimants to first file claims in the state court under the statutory scheme and then remove them to multiple federal courts, either directly or under motions to change forum, the state statutory scheme will be crippled.

Allstate concedes that the district court in this case "emphasized that a central issue in this case is Allstate's defense of set-off . . . [n]oting that this issue was controlled by state law."²² Allstate also admits that the underlying action involves a declaratory relief action by the Commissioner,²³ and does not dispute the Commissioner's description of how this case is intricately inter-

²¹ Opposition, at 19-20.

²² Opposition, at 6.

²³ Opposition, at 4, fn.3.

woven with the California statutory scheme.²⁴ Moreover, Allstate does not dispute the Commissioner's argument that the instant controversy involves the correct application and interpretation of California case and statutory law including unsettled issues of state law.²⁵

It is also significant that Allstate does not dispute the Commissioner's point that the underlying suit involves special proceedings and an action for declaratory relief both of which are equitable proceedings. Further, Allstate makes no effort to describe how the equity-law distinction could be utilized in complex cases, such as the instant case, which involve multiple causes of action; some of which sound in equity and some of which are actions at law.

Having failed to contest these and related points, Allstate cannot and does not even attempt to deal with the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15²⁶ and this Court's rationale in cases such as *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914); *Osborn v. Ozlin*, 310 U.S. 53 (1940); *California State Auto. Ass'n Inter-Insurance Bureau v. Maloney*, 341 U.S. 105 (1951), and *United States Department of The Treasury v. Fabe*, 508 U.S. —, 113 S. Ct. 2202 (1993), all of which recognize and protect the strong public policy issues involved with the insurance business and insurance insolvency proceedings. These precedents would be seriously undercut unless the Commissioner is able to administer insurance insolvency proceedings in a comprehensive state court action.

²⁴ Petition, at 3-9.

²⁵ For example, Allstate does not take issue with the Commissioner where, at page 8 of the Petition, he states "Part of the instant litigation involves the correct application and interpretation of the *Prudential* decision. There are unsettled difficult issues of state law. . . ."

²⁶ Allstate simply states that it disagrees with the Commissioner's assertion that McCarran-Ferguson and the cited provisions of the California Insurance Code apply to this case. Opposition, at 2. Allstate never tells this Court why they do not apply.

CONCLUSION

Allstate fails to respond directly to the substantial authority offered by the Commissioner and presents only weak efforts to paint over the Ninth Circuit's conflicts with other circuit courts and with decisions of this Court. In the final analysis Allstate urges this Court to leave the substantial questions presented in their current state of uncertainty in the hope that, after some period of years, all will become clear without the guidance of this Court.

To deny the Commissioner's Petition would effectively fan the fires of uncertainty and create further confusion with respect to basic principles that this Court's recent opinions have done so much to protect. The opinion of the Ninth Circuit in this case should not be permitted to stand shoulder to shoulder with this Court's important recent decisions which promote fundamental principles of federalism, defend the prerogatives of state government and promote the wise allocation of judicial and appellate resources. The Commissioner's Petition should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHUCK QUACKENBUSH, Insurance Commissioner of the State of California, in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, Enterprise Insurance Company Trust, Holland-America Insurance Company Trust and Mission Reinsurance Corporation Trust,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF OF THE COMMISSIONER OF INSURANCE OF
THE STATE OF MISSOURI AS AMICUS CURIAE
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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**Motion for Leave to File Brief of Amicus Curiae
in Support of Petition for Writ of Certiorari**

COMES NOW the Director of the Department of Insurance, Amicus Curiae, and hereby requests leave of the Court to file his Brief of Amicus Curiae in Support of Petition for Writ of Certiorari for the reasons stated below:

1. The Director of the Department of Insurance is the duly appointed head of the state agency of the State of Missouri responsible for the regulation of insurance companies, including the supervision, rehabilitation and liquidation of financially impaired insurers domiciled or doing business in the State of Missouri. Within his authority as Director, he may maintain actions in his official capacity and on behalf of the state without representation or action of the Attorney General of the State. *State of Missouri v. Homesteaders Life Ass'n*, 90 F.2d 543 (8th Cir. 1937), *cert. denied* 302 U.S. 717. Under these circumstances, the Director may file this brief without the consent of the parties to the action under Rule 37.5 of the Court.

2. The Director has obtained the consent of Petitioner Chuck Quackenbush to the filing of this brief. The Director has been advised that such consent in writing is or has been forwarded to the Court.

3. The Director has been unable to obtain the consent of Allstate Insurance Co. To date, Allstate has not said that it would not consent or that it would object to the filing of this brief. Counsel for the Director and counsel for Allstate were unable to discuss the matter of consent in time for Allstate to fully consider the matter and advise the Director of its decision prior to the deadline for the printing and filing of this brief. Counsel of record for the Director has been advised by counsel for Allstate that it is considering the question of consent and that written consent may, but not necessarily, be forthcoming.

4. The brief of the Director, if accepted for filing, will provide the Court with additional insight into how the resolution of the abstention issue will affect a different state regulator under a slightly different set of statutes. In this regard, and in its discussion of the abstention issue, the Director believes that its brief brings to the Court's attention matters not brought to the attention of the Court by the parties. As such, it will be of considerable help to the Court in its determination of whether to grant the writ of certiorari. Rule 37.1.

WHEREFORE, the Director of the Department of Insurance of the State of Missouri, Amicus Curiae,, moves the Court for its order granting it leave to file its Brief of Amicus Curiae in Support of Petition for Writ of Certiorari and directing the Clerk of the Court to file the same, and for such other and further relief as the Court deems just and proper.

/s/ Thomas W. Rynard

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QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Ninth Circuit erred in holding that the abstention powers of federal courts are limited to actions in equity, or alternatively, whether that court erred in limiting the exercise of *Burford* abstention solely to actions in equity.

TABLE OF CONTENTS

	Page
Motion for Leave to File Brief of Amicus Curiae in Support of Petition for Writ of Certiorari	i
Question Presented for Review	iii
Table of Contents	v
Table of Authorities	vi
Interest of <i>Amicus Curiae</i>	1
Summary of Argument	4
I.	4
II.	5
Argument	6
I.	6
II.	10
Conclusion	13
Appendix	A-1

TABLE OF AUTHORITIES

	Page(s)
Cases:	
Allendale Mutual Insurance Co. v. Melahn, 773 F. Supp. 1283 (W.D. Mo. 1991)	9,9 n.2,11
Burford v. Sun Oil Co., 319 U.S. 315 (1943)	4,7
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	6
Commonwealth of Pennsylvania v. Williams, 294 U.S. 176 (1935)	5,10,11
Harrison v. NAACP, 360 U.S. 167 (1959)	12
Klaber v. O'Malley, 90 S.W.2d 396 (Mo. 1936)	2
Lucas v. Manufacturing Lumbermen's Underwriters, 163 S.W.2d 750 (Mo. 1942)	2
Medallion Insurance Co. v. Whartenbee, 568 S.W.2d 599 (Mo. App. 1978)	2,9
New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989)	11
O'Malley v. Prudential Casualty & Surety Co., 80 S.W.2d 896 (1935)	9
Wolfson v. Mutual Benefit Life Ins. Co., 51 F.3d 141 (8th Cir. 1995)	3,6
Statutory Provisions:	
Mo. Rev. Stat. §§ 375.570 - .750 (1994)	8 n.1
Mo. Rev. Stat. §§ 375.950 - .990 (1994)	8 n.1

Mo. Rev. Stat. § 375.954 (1994)	2
Mo. Rev. Stat. § 375.958 (1994)	2
Mo. Rev. Stat. §§ 375.1150 -.1246 (1994)	8 n.1
Mo. Rev. Stat. §§ 375.1158 (1994)	9
Mo. Rev. Stat. § 375.1160 (1994)	2
Mo. Rev. Stat. § 375.1166 (1994)	2
Mo. Rev. Stat. § 375.1174 (1994)	2
Mo. Rev. Stat. § 375.1176 (1994)	2
Mo. Rev. Stat. § 375.1182.5 (1994)	2,7
Mo. Rev. Stat. § 375.1198 (1994)	8
Mo. Rev. Stat. § 375.1204 (1994)	8
Other:	
Shapiro, David L., <i>Jurisdiction and Discretion</i> , N.Y.U.L. Rev. 543 (1985)	12

No. 95-244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHUCK QUACKENBUSH, Insurance Commissioner of the State of California, in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, Enterprise Insurance Company Trust, Holland-America Insurance Company Trust and Mission Reinsurance Corporation Trust,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF OF THE COMMISSIONER OF INSURANCE OF
THE STATE OF MISSOURI AS *AMICUS CURIAE*
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

INTEREST OF *AMICUS CURIAE*

Jay Angoff is the duly appointed Director of the Division of Insurance of the State of Missouri. In that capacity he acts as statutory supervisor, rehabilitator and liquidator of troubled and insolvent insurance companies in both domiciliary and ancillary proceedings relating to the management of those types of enti-

ties. §§ 375.954, 375.958, 375.1174, 375.1160, 375.1166 and 375.1176, RSMo 1994. In serving in these capacities, the Director operates under a complex and complete system for the exercise of the state's police power in protecting the public and specific policyholders from the financial difficulties of affected insurance companies. *Klaber v. O'Malley*, 90 S.W.2d 396 (Mo. 1936)(superintendent acts as state officer when carrying out duties related to insurance company insolvency); *Lucas v. Manufacturing Lumbermen's Underwriters*, 163 S.W.2d 750 (Mo. 1942)(insurance department and its superintendent act as administrative agency when taking charge of an insurance company and is not merely a receiver); *Medallion Insurance Co. v. Whartenbee*, 568 S.W.2d 599, 601 (Mo. App. 1978)(regulation of financially impaired insurers involves a valid exercise of the police power in protecting both public and private interests).

Further, by statute, "The director as liquidator, any special deputy, all employees, agents and attorneys of the liquidator and the special deputy, and all employees of the state of Missouri when acting with respect to the liquidation shall be considered to be officers of the court when acting in such capacities and as such shall be subject to the orders and directions of the court with respect to their actions or omissions in connection with the litigation." Mo. Rev. Stat. §375.1182.5 (1994). This close connection between the court supervising the liquidation and the Director as liquidator has also resulted in the Director and the others made officers of the court being granted absolute judicial immunity from claims against them for their liquidation-related activities. *Id.*

The Director of the Department of Insurance has an interest in this case for a variety of reasons. First, and foremost, the core issue of the ability of the federal courts to interpose themselves in a complex and complete state regulatory scheme involving the financial condition of insurance companies is an important question of federal law which will immediately and substantially

affect the ability of the Director to carry out the state statutory mechanisms for dealing with financially impaired companies. The effect of this issue is not related solely to the insolvency proceeding under which the case came before the district and circuit courts. It will ultimately affect the entire scope of regulatory remedies for dealing with financially-impaired companies, from supervision to rehabilitation to liquidation.

Second, the Director is interested in the matter because of the conflict of opinions between the Eighth and Ninth Circuits on the issue. In *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995), the Eighth Circuit (the Circuit within which the Director is located) held that *Burford* abstention is not dependent on the existence of equitable remedies in the case. While this dichotomy between the circuits exists, state insurance regulators, such as the Director, will suffer the uncertainty of which approach applies. This is true even with respect to a circuit which has issued a pronouncement on the subject. As *Wolfson* and the opinion sought to be reviewed here show, this is an evolving issue in the area of insurance regulation, the two opinions having been handed down within little more than a month of each other. The confusion and uncertainty to be engendered by the difference in these two opinions in a developing area of the law can only lead to additional and protracted litigation in on-going and future supervision-rehabilitation-liquidation proceedings. The Director wishes to see such uncertainty eliminated.

Third, as set forth in greater detail in the argument section of this brief, the Director believes that the Ninth Circuit approach in *Garamendi v. Allstate Insurance Co.*, 47 F.3d 350 (9th Cir. 1995), incorrectly states the law with respect to abstention, particularly in the area of the regulation of financially impaired insurers. Both in terms of resolving any uncertainty existing by virtue of the difference between the Eighth and Ninth Circuits and to prevent the federal courts from interposing themselves

unduly in a matter of state regulatory concern, this Court should grant the writ of certiorari in this matter and adopt the *Wolfson* approach with respect to the issue.

Amicus has a substantial interest in the request for the Court's consideration of the underlying issue in this matter because of his responsibility for the regulation of financially impaired insurance companies within the state of Missouri. This brief is intended to provide the Court with a perspective of a state regulator operating under a slightly different set of statutes than the parties to this case and the effect of the *Garamendi* position on such a regulator.

SUMMARY OF ARGUMENT

I.

State law provides for a comprehensive system of the regulation of insurers in the area of supervision, rehabilitation and liquidation of financially impaired insurers. Abstention by federal courts from granting relief in cases before them is particularly apt to these type of proceedings under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Decisions by the federal courts of issues of substantial state concern in this area can only lead to a disruption of state efforts to establish a coherent policy with respect to the regulation of financially impaired insurers. The Ninth Circuit's *Garamendi* decision incorrectly decided that abstention was inappropriate in cases closely related to the collection and distribution of assets of the estate. Given the importance of this federal law question of abstention, its nationwide effect on the regulation of financially impaired insurers by state regulators and the difference of opinion on this issue between the Eighth and Ninth Circuits, the Court should issue its writ of certiorari and enter its opinion that federal courts should abstain from deciding such issues.

SUMMARY OF ARGUMENT

II.

The essence of *Garamendi* is that the abstention doctrine has limited application to actions sounding in equity and that, since the action before it was not one in equity, there could be no abstention. The Ninth Circuit both mischaracterized the type of action before it and also unduly limited the abstention doctrine to equitable remedies. An action in receivership has been recognized by the Court as involving the exercise of equitable powers. *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176 (1935). The determination of the issue of set-off was inextricably related to the receivership functions of collecting and distributing assets. As such, it would have involved an exercise of the district court's equitable powers. In addition, the limitation of abstention to equity actions ignores that abstention relates to the fashioning of a remedy by a federal court and not to its exercise of jurisdiction. There is no just reason why discretion cannot also be exercised in matters at law, particularly where the federal court is merely deferring to the state court to consider a matter of substantial state concern and to allow it the opportunity to first resolve the matter in a complete and acceptable manner. Given the importance of the abstention issue as an issue of federal law and the conflict between the Eighth and Ninth circuits on the matter, the Court should issue its writ of certiorari to resolve the issue and determine that abstention was proper under the circumstances presented to the district court.

ARGUMENT

I.

THE POSITION ON ABSTENTION EXPRESSED IN *GARAMENDI* v. *ALLSTATE INSURANCE CO.*, 47 F.3d 350 (9th Cir. 1995), WOULD PERMIT FEDERAL COURTS TO UNDULY INTERFERE IN COMPLEX AND COMPLETE STATE STATUTORY SCHEMES FOR THE REGULATION OF FINANCIALLY IMPAIRED INSURERS.

The Court should grant its writ of certiorari to consider the decision of the Ninth Circuit in *Garamendi v. Allstate Insurance Co.*, 47 F.3d 350 (9th Cir. 1995), both because that decision wrongly decides the important question of federal court abstention in the context of proceedings to regulate financially impaired insurers and because that decision conflicts with the Eighth Circuit's position on the same issue. *Wolfson v. Mutual Benefit Life Insurance Co.*, 51 F.3d 141 (8th Cir. 1995). The *Wolfson* approach correctly applies the policy considerations underlying the federal abstention doctrines.

Among other circumstances, abstention is "appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. . . . In some cases, however, the state question need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976). In essence, abstention under these circumstances recognizes that the definition and interpretation of state policy of substantial public concern is more appropriately made by state courts, particularly when deferral would not implicate matters of sig-

nificant federal concern. See, e.g., *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943) (abstention appropriate in part because ultimate review of federal questions by federal court was preserved). The *Garamendi* decision trivializes the disruption of the state efforts to establish a coherent policy with respect to the regulation of financially impaired insurers by state departments of insurance, as well as ignores the absence of a significant federal issue in the matter.

Under the Missouri regulatory scheme, which would be substantially impaired by the *Garamendi* position, the Director, his appointed deputies and the employees of the State Department of Insurance working on insolvency matters assist the state court in the administration of estates of insolvent companies. The state legislature has determined that such an intimate relationship between the Director and the receivership court is so essential to the success of the regulatory scheme that it has designated the Director and his associates as officers of the court in their receivership-related activities. Mo. Rev. Stat. § 375.1182.5 (1994). The importance of the Director and his associates to the receivership process is further reflected by the fact that the legislature has granted absolute judicial immunity to these individuals when they are carrying out their functions as officers of the court in a receivership proceeding. Mo. Rev. Stat. § 375.1182.5 (1994).

One of the salient characteristics of the regulatory scheme which called for federal court abstention in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943), was that the agency and the state courts were "working partners in the business of creating a regulatory system" for the industry affected. 319 U.S. at 326, 63 S. Ct. at 1103. The same is true with respect to the California regulatory scheme considered in *Garamendi* and other insurance insolvency and rehabilitation regulatory schemes in the other states. The particularly close working partnership exhibited under the Missouri statute would be jeopardized by the position of the Ninth Circuit.

In addition, the heart of the claim underlying *Garamendi* was the claim of Allstate as a reinsurer to obtain a set-off of monies it was owed by the insolvent insurers against the monies it owed that entity. *Garamendi*, Petition for Writ of Certiorari, Appendix A, at 4a. As the California and Missouri statutes illustrate, the determination of if and when a set-off is available is a question which will have substantial impact on the estate of the insolvent. The question is not as simple as the Ninth Circuit has painted it in terms of merely balancing the ledgers of the insolvent company.

The complicated nature of the set-off question is well-illustrated by the Missouri set-off statute. There are specific limitations on the ability of reinsurers to set off mutual credits or debts. Mo. Rev. Stat. § 375.1198.2(6) & .3 -.6 (1994). The meaning of these specific limitations intended by the legislature and their application to the existing complex reinsurance arrangements must be first determined before a final liability can be determined. There are also general limitations on the right of set-off. Mo. Rev. Stat. §§ 375.1198.2(4) & (5), & 375.1204 (1994). The application of these provisions to reinsurers ceding and being ceded business with the insolvent insurer under the state statutory scheme for regulating insolvent insurers is another matter which would have to necessarily be resolved before ledgers could be balanced.

The complexity of the issue becomes even more apparent when the interplay of the different statutes under which the regulation of troubled and insolvent insurers occurs is considered.¹ Under Missouri law, substantive rights of the various

¹ With respect to troubled and insolvent insurers Missouri operates under the Uniform Insurer's Liquidation Act, Mo. Rev. Stat. §§ 375.950 - 375.990 (1994), the Insurers Supervision, Rehabilitation and Liquidation Act, Mo. Rev. Stat. §§ 375.1150 - 375.1246 (1994), and other provisions, Mo. Rev. Stat. §§ 375.570 - 375.750 (1994).

parties involved in a proceeding depends on the date at which the proceeding was initiated, the relevant date being August 31, 1991. Mo. Rev. Stat. § 375.1158 (1994). Thus, it would first be necessary to determine if set-off was procedural or substantive under this statute.² Then, if set-off was allowed, the federal court would be required to consider the issue of the application of the Missouri set-off statute. Only then could it determine the extent of the mutual credits and debts.

The Missouri statutes on supervision, rehabilitation and liquidation of financially impaired insurers, like the California statute, is an all-encompassing, comprehensive self-contained statutory scheme for protecting public and private interests from the financial insolvency of insurers. *O'Malley v. Prudential Casualty & Surety Co.*, 80 S.W.2d 896, 897 (1935); *Medallion Insurance Co. v. Whartenbee*, 568 S.W.2d 599, 601 (Mo. App. 1978). Debts owed by reinsurers to the insolvent company under reinsurance agreements are significant and substantial assets of the insolvent company and integral to the success of the efforts of the state regulators to protect the public and policyholders from the insolvency of the company. *Allendale Mutual Insurance Co. v. Melahn*, 773 F. Supp. 1283, 1287-88 (W.D. Mo. 1991).

The Ninth Circuit has overlooked this nexus between the recovery of assets of the insolvent estate and the success of the state's regulatory schemes in supervising, rehabilitating and liquidating financially impaired insurers. On the other hand, this Court has specifically recognized that statutory schemes for marshalling assets and settling the affairs of financially strapped

² For the same issue under consideration by the Ninth Circuit in *Garamendi*, set-off was determined by a federal district court to be unavailable to reinsurers in a liquidation proceeding under both Missouri common law and the statutory procedure then in existence. *Allendale Mutual Insurance Co. v. Melahn*, 773 F. Supp. 1283, 1286-87 (W.D. Mo. 1991).

entities should be self-contained and the importance of refraining from outside interference with those entrusted with carrying out these activities. *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176, 183, 55 S. Ct. 380, 384 (1935)(federal court should not undertake to appoint receiver and liquidate banking corporation where there is nothing to indicate that state procedure for obtaining the same ends is inadequate or will not be diligently and honestly followed).

Garamendi has incorrectly resolved the important issue of abstention in proceedings dealing with the comprehensive state regulatory schemes for insolvent insurers. Its position is also in conflict with the position of the Eighth Circuit on the same issue. The Court should issue its writ of certiorari to resolve this issue.

ARGUMENT

II.

THE POSITION ON ABSTENTION EXPRESSED IN *GARAMENDI* v. *ALLSTATE INSURANCE CO.*, 47 F.3d 350 (9th Cir. 1995), MISCONSTRUES THE NATURE OF THE ACTION BEFORE IT AND, ALTERNATIVELY, WOULD UNDULY LIMIT THAT DOCTRINE TO ACTIONS AT EQUITY.

The essence of *Garamendi* is that the abstention doctrine has limited application to actions sounding in equity and that, since the action before it was not one in equity, there could be no abstention. In *Garamendi*, the Ninth Circuit both mischaracterized the type of action before it and also unduly limited the abstention doctrine to equitable remedies. Given the importance of the abstention issue as an issue of federal law and the conflict between the Eighth and Ninth circuits on the matter, the Court should issue its writ of certiorari to resolve the issue.

The petitioner here set forth a number of examples of the equitable nature of the issues before the district court. In addition

to those, the Ninth Circuit failed to see that the basic relief sought was itself equitable in nature. In *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176, 55 S. Ct. 380 (1935), the Court recognized that an action to liquidate a going business concern — the process of appointing a receiver to collect the assets of the business, convert them to cash and pay the creditors of the business — was an exercise of the court's equity powers. 294 U.S. at 183, 55 S. Ct. at 383-84.

The issue of the set-off which is the heart of the *Garamendi* case, when correctly viewed in its form and effect, is merely one part of this equitable process of liquidation. Receivables of a reinsurer owed to the insolvent insurer is a part of the marshalling of the assets of the estate. *Allendale Mutual Insurance Co. v. Melahn*, 773 F. Supp. 1283, 1287-88 (W.D. Mo. 1991). Under the California set-off statute under consideration in *Garamendi* and the similar Missouri set-off statute, a set-off combines the function of both marshalling the assets of the estate as to the amount owed the insolvent by the reinsurer and making a distribution as to the amount owed by the insolvent company to the insurer. This is an integral part of the equitable receivership process. A federal district court should not be allowed to avoid application of the abstention doctrine on the basis that it has been asked to interpose itself in a singular aspect of the comprehensive receivership process.

The Ninth Circuit approach would also unduly limit the application of the abstention doctrine to cases involving the equity remedy. In rejecting the "legal" side of the federal court's judicial powers, the Ninth Circuit appears to confuse the question of jurisdiction with the question of remedy. Abstention deals with the remedy to be afforded a party, not to whether the court has the jurisdiction to consider the question presented. *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359, 109 S. Ct. 2506, 2513 (1989).

As noted in *Harrison v. NAACP*, 360 U. S. 167, 177 (1959), the effect of abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise." A decision to refrain from granting a remedy in an action at law in order to defer to the state court in recognition of its role as the final expositor of state law and to give it an opportunity to fashion a remedy which may be acceptable to the parties is not contrary to a federal court's full exercise of its jurisdiction. In form and effect, as in the doctrine of exhaustion of remedies, the federal court is merely deferring to the state court to consider a matter of substantial state concern and to allow it the opportunity to first resolve the matter in a complete and acceptable manner. Such an exercise of discretion in affording a state remedy by a federal court should not necessarily be limited to actions sounding in equity. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543 (1985).

The Ninth Circuit was wrong both as to its characterization of *Garamendi* as a case solely involving legal remedies and in limiting the *Burford* abstention doctrine to actions involving equitable remedies. In this latter regard, the *Wolfson* opinion of the Eighth Circuit correctly determines this issue. The Court should issue its writ of certiorari for the purpose of adopting the Eighth Circuit approach to the issue.

CONCLUSION

The doctrine of *Burford* abstention is not limited to actions involving equitable remedies. The Ninth Circuit too narrowly limits this doctrine in its *Garamendi* decision. The Court should issue its writ of certiorari in order to review the Ninth Circuit's decision and issue its opinion adopting the Eighth Circuit approach on the issue.

/s/ Thomas W. Rynard

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APPENDIX

APPENDIX A

375.1158. Provisions apply prospectively, exceptions—restrictions on insurer in delinquency proceeding.—1. Unless otherwise provided, the portions of sections 375.1150 to 375.1246 which substantively affect the rights of any person shall be only applicable prospectively. The provisions of sections 375.650 to 375.700, sections 375.740 and 375.750, and sections 375.950 to 375.990 shall be effective and apply only to proceedings instituted pursuant to those sections prior to August 28, 1991. The provisions of sections 375.1150 to 375.1246 which are procedural in nature and which do not conflict with any provision of sections 375.570 to 375.750 and sections 375.950 to 375.990 applicable to any proceeding instituted prior to August 28, 1991, shall be applicable to proceedings instituted prior to August 28, 1991; provided that the provisions of this subsection shall not affect any final order entered by a court of competent jurisdiction prior to August 28, 1991.

375.1182. Powers of liquidator—insureds may purchase extended period to report claims, when, limitations—liquidator and employees deemed officers of the court.—

* * *

.5 The director as liquidator, any special deputy, all employees, agents and attorneys of the liquidator and the special deputy, and all employees of the state of Missouri when acting with respect to the liquidation shall be considered to be officers of the court when acting in such capacities and as such shall be subject to the orders and directions of the court with respect to their actions or omissions in connection with the liquidation. The liquidator, special deputy, commissioners and referees appointed by the court, the agents, attorneys and employees of the liquidator and employees of the state of Missouri when acting with respect to the liquidation shall enjoy absolute judicial immunity and be immune from any claim against them personally for any

act or omission committed in the performance of their functions and duties in connection with the liquidation.

375.1198. Mutual credits or debts, setoffs allowed—exceptions—procedures.—1. Mutual debts or mutual credits, whether arising out of one or more contracts, between the insurer and another person in connection with any action or proceeding under sections 375.1150 to 375.1246, sections 374.216 and 374.217, RSMo, and section 382.302, RSMo, shall be set off and the balance only shall be allowed or paid, except as provided in subsections 2, 3, 4, 5 and 6 of this section and section 375.1204.

.2 No setoff shall be allowed in favor of any person where:

(1) The obligation of the insurer to the person would not as of the date of the filing of a petition for liquidation entitle the person to share as a claimant in the assets of the insurer;

(2) The obligation of the insurer to the person was purchased by or transferred to the person with a view to its being used as a setoff; or

(3) The obligation of the person is to pay an assessment levied against the members or subscribers of the insurer, or is to pay a balance upon a subscription to the capital stock of the insurer, or is in any other way in the nature of a capital contribution; or

(4) The obligation of the insurer is owed to an affiliate of such person or to any entity or association, rather than the person; or

(5) The obligation of the person is owed to an affiliate of the insurer or to any other entity or association, rather than the insurer; or

(6) The obligations between the person and the insurer arise from reinsurance relationships resulting in business which is both ceded to and assumed from the insurer.

.3 As soon as practicable, the receiver shall provide persons who assumed business from the insurer as reinsurers with statements of account identifying debts which are currently due and payable to the insurer. Such persons may set off against such debts only mutual credits which are currently due and payable by the insurer to such persons for the period covered by the accounting statements.

.4 A person who ceded business to the insurer may set off debts due the insurer against only those mutual credits which the person has paid or which have been allowed in a delinquency proceeding.

.5 Notwithstanding the foregoing, a setoff of sums due on obligations in the nature of those prescribed in subdivision (6) of subsection 2 of this section shall be allowed for those debts accruing from business written under reinsurance contracts which were entered into, renewed or extended with the express written approval of the director where Missouri is the state of domicile of the insolvent insurer and when in the judgment of the director such action is deemed necessary or advisable in order to prevent or mitigate a threatened impairment or insolvency of a domiciliary insurer, in connection with supervision or conservation proceedings pursuant to this act or otherwise in connection with the exercise of the director's regulatory responsibilities concerning a threatened impairment or insolvency without the institution of any delinquency proceedings.

.6 The provisions of this section shall apply to all obligations incurred under contracts entered into, renewed, or extended on or after July 1, 1992, and to any existing contract with a termination date longer than one year from January 1, 1993, and shall supersede any contractual provisions which might be construed to enlarge the setoff rights of any person under any contract with the insurer; provided that the provisions of subdivision (6) of subsection 2 and subsections 3, 4 and 5 of this

section shall not apply to insurers or reinsurers until such time that the director determines that substantially similar provisions are effective in a sufficient number of states so as not to place domestic insurers or reinsurers at a competitive disadvantage. The director shall promulgate a rule announcing any determination as is necessitated by this subsection.

375.1202. Reinsurers, amounts recoverable not reduced due to delinquency proceedings.—The amount recoverable by the liquidator from reinsurers shall not be reduced as a result of the delinquency proceedings, regardless of any provision in the reinsurance contract or other agreement. Payment made directly to an insured or other creditor shall not diminish the reinsurer's obligation to the insurer's estate.

375.1204. Payment of unearned premiums required—failure to pay, penalties.— .1 An agent, broker, premium finance company, or any other person, other than the insured, responsible for the payment of a premium, shall be obligated to pay any unpaid earned premium due the insurer at the time of the declaration of insolvency as shown on the records of the insurer. The liquidator shall also have the right to recover from such person any part of an unearned premium that represents commission of such person. Credits or setoffs or both shall not be allowed to an agent, broker, or premium finance company for any amounts advanced to the insurer by the agent, broker, or premium finance company on behalf of, but in the absence of a payment by the insured. An insured shall be obligated to pay any unpaid earned premium due the insurer at the time of the declaration of insolvency, as shown on the records of the insurer.

.2 Upon satisfactory evidence of a violation of this section, the director may pursue either one or both of the following courses of action:

(1) Suspend or revoke or refuse to renew any licenses issued by the department of insurance to such offending party or parties;

(2) Impose an administrative penalty of not more than one thousand dollars for each and every act in violation of this section by said party or parties. All amounts collected as a result of imposition of such administrative penalties shall be paid to the state treasurer for deposit to the general revenue fund.

.3 Before the director shall take any action as set forth in subsection 2 of this section, he shall give written notice to the person, company, association or exchange accused of violating the law, stating specifically the nature of the alleged violation and fixing a time and place, at least ten days thereafter, when a hearing on the matter shall be held. After such hearing, or upon failure of the accused to appear at such hearing, the director, if he shall find such violation, shall impose such of the penalties under subsection 2 of this section as he deems advisable.

.4 When the director shall take any action provided by subsection 2 of this section, the party aggrieved may appeal said action to the court within thirty days of the director's decision.

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
 THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
 LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE
 COMPANY TRUST, MISSION NATIONAL INSURANCE
 COMPANY TRUST, ENTERPRISE INSURANCE COMPANY
 TRUST, HOLLAND-AMERICA INSURANCE COMPANY
 TRUST AND MISSION REINSURANCE CORPORATION TRUST,
Petitioner,

v.

ALLSTATE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the
 United States Court of Appeals
 for the Ninth Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

	Page
Relevant docket entries in the Superior Court of the State of California, County of Los Angeles, Case No. C751868	1
Relevant docket entries in the United States District Court, Central District of California, Case No. CV90-4713WMB	2
Relevant docket entries in the United States Court of Appeals for the Ninth Circuit, Case No. 91-55855.....	5
Orders of the Superior Court of the State of California for the County of Los Angeles, Appointing Conservator and Restraining Order in Cases No.: C576323, C576324, C576325 and C576416 (November 26, 1985)	8
Order of the Superior Court of the State of California for the County of Los Angeles, Amended Order Appointing Conservator and Restraining Order (May 2, 1986)	20
Orders of the Superior Court of the State of California for the County of Los Angeles, Appointing Liquidator and Restraining Order in Cases No.: C576323, C576324, C576325 and C576416 (February 24, 1987) ..	23
Complaint (February 9, 1990)	35
Notice of Related Cases (February 9, 1990)	62
Final Order of Rehabilitation (April 25, 1990)	64
Notice of Removal of Civil Action (August 31, 1990)....	73
Notice of Motion and Motion to Compel Arbitration and Stay Prosecution (September 10, 1990)	77
Memorandum of Points and Authorities in Support of Motion to Compel Arbitration and Stay Prosecution (September 10, 1990)	79
Declaration of David S. Brodnan in Support of Motion to Compel Arbitration and Stay Prosecution (September 10, 1990)	96

TABLE OF CONTENTS—Continued

	Page
Supplemental Notice of Removal of Civil Action and Statement of Additional Grounds for Removal and Jurisdiction (February 8, 1991)	111
Petition for Rehearing and Suggestion for Rehearing En Banc (February 16, 1995)	116
Response to Petition for Rehearing and Suggestion for Rehearing En Banc (March 19, 1995)	169
Note:	
The following documents do not appear in this Joint Appendix because they were reproduced in the Appendix to the Petition for Certiorari:	
Opinion of the United States Court of Appeals for the Ninth Circuit, dated February 2, 1995 (Appendix A)	2a
Order of the United States District Court, Central District of California, dated July 1, 1991 (Appendix B)	13a
Order of the United States Court of Appeals for the Ninth Circuit, dated May 19, 1995 (Appendix C)	35a
15 U.S.C. §§ 1011-1015 (Appendix D)	38a
California Insurance Code §§ 900-900.2, 900.9, 903-903.5, 905-911, 922.1-923.5, 925, 925.2, 925.4, 1010-1042, 1056.5-1064.12 (Appendix D)	39a
28 U.S.C. §§ 1332(a), 1441(a), (c) (Appendix D)	115a
Order of the Superior Court of the State of California for the County of Los Angeles, Appointing Conservator and Restraining Order in Case No. C572724, dated October 31, 1985 (Appendix E)	116a
Order of the Superior Court of the State of California for the County of Los Angeles Appointing Liquidator and Restraining Order in Case No. C572724 dated February 24, 1987 (Appendix E)	119a

TABLE OF CONTENTS—Continued

	Page
Supplemental Order of the Superior Court of the State of California for the County of Los Angeles, Regarding Order Appointing Liquidator and Restraining Order in Cases No. C572724, C576416, C576324, C576325 and C576323 dated March 5, 1987 (Appendix E)	122a
Excerpts of Respondent Allstate's Opening and Reply Briefs in the United States Court of Appeals for the Ninth Circuit (Appendix F)	127a
The following documents do not appear in this Joint Appendix because they were reproduced in the Appendix to the Brief in Opposition to Petition for Writ of Certiorari:	
Order of the United States Court of Appeals for the Ninth Circuit, dated February 14, 1992 (Appendix 1)	1a
28 U.S.C. § 1447 (Appendix 2)	3a
9 U.S.C. §§ 1-16 (Appendix 2)	4a

**SUPERIOR COURT
FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

Case No. C 751868

QUACKENBUSH

v.

ALLSTATE INSURANCE COMPANY

RELEVANT DOCKET ENTRIES

Date	Proceedings
1990	
2/9/90	COMPLAINT filed and summons issued.
2/13/90	NOTICE OF RELATED CASES filed.
3/1/90	COURT finds that C751868 is related to C572724 and is assigned to Division 67.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV90-4713WMB

QUACKENBUSH

v.

ALLSTATE INSURANCE COMPANY,

RELEVANT DOCKET ENTRIES

Date	Proceedings
1990	
8/31/90	NOTICE by defendant of removal from Los Angeles County Superior Court with copy of Summons & Complaint, NOTICE by defendant of related cases & 1st set of interrogatories.
9/10/90	DECLARATION by defendant of David Brodnan in support of motion. MEMORANDUM OF POINTS AND AUTHORITIES by defendant in support of motion. MOTION by defendant to compel arbitration.
9/13/90	MINUTE ORDER re: plaintiff's motion to remand is to be filed by 9/24/90 with the opposition due by 10/1/90 and reply due 10/5/90, motion will be heard on 10/16/90 at 10 am; if the motion to remand is denied, a hearing date on the motion to compel arbitration will be set at that time.
9/25/90	MOTION by plaintiff to remand.

Date	Proceedings
1990	
	DECLARATION by plaintiff of Kooistra in support of motion to remand. REQUEST by plaintiff for judicial notice in support of motion to remand. MEMORANDUM OF POINTS AND AUTHORITIES by plaintiff in support of motion to remand.
10/9/90	MEMORANDUM OF POINTS AND AUTHORITIES by defendant in opposition to motion to remand. DECLARATION by defendant of David Brodnan in opposition to motion to remand. REQUEST by defendant for judicial notice in opposition to motion to remand.
10/30/90	REPLY by plaintiff to defendant's opposition to motion to remand. 2ND REQUEST by plaintiff for judicial notice in support of motion to remand.
1991	
2/8/91	STIPULATION by defendants to plaintiff's dismissal of certain named defendants. SUPPLEMENTAL NOTICE OF REMOVAL of action and statement of additional ground for removal and jurisdiction by defendants.
2/15/91	SUPPLEMENTAL BRIEF by plaintiff in support of motion to remand and opposition to defendant's supplemental notice of removal of civil action and statement of additional grounds for removal and jurisdiction.
3/22/91	SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES by plaintiff in support of motion to remand.

Date	Proceedings
1991	APPENDIX OF NON-CALIFORNIA AUTHORITIES by plaintiff in support of supplemental memorandum of points and authorities in support of motion to remand.
	SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES by defendant Allstate re: Commissioner's motion to remand.
4/5/91	BRIEF by plaintiff in reply to Allstate's supplemental memorandum of points and authorities.
	SUPPLEMENTAL REPLY MEMORANDUM OF POINTS AND AUTHORITIES by defendant Allstate respecting Commissioner's motion to remand.
4/10/91	APPENDIX OF NON-CALIFORNIA AUTHORITIES by plaintiff in support of Insurance Commissioner's brief in reply to Allstate supplemental memorandum of points and authorities.
4/18/91	MINUTE ORDER by the Court ruling that the motion to remand is granted. However, the Court takes the matter under submission and a written order will be filed and mailed to counsel.
7/1/91	ORDER by court holding that Burford abstention is appropriate here, the Commissioner's motion to remand this action to state court is granted.
7/17/91	NOTICE OF APPEAL TO 9TH CIRCUIT filed by defendant from order filed 7/1/91. Filing and document fee billed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 91-55855

QUACKENBUSH

v.

ALLSTATE INSURANCE COMPANY

RELEVANT DOCKET ENTRIES

Date	Proceedings
1991	
8/7/91	DOCKETED cause and entered appearances of counsel.
10/15/91	CERTIFICATE OF RECORD on appeal filed in District Court 10/3/91.
11/6/91	MOTION by Appellant in 91-55855 to consolidate cases 91-55855 and 91-55907.
	ORDER by Deputy Clerk that Appellants' motion to consolidate cases is granted.
11/7/91	OPENING BRIEF by Appellant in 91-55855; filed original and 15 copies, 40 pages and five excerpts of record in 1 volume served on 11/4/91.
1992	
1/7/92	BRIEF by Appellee in 91-55855 and 91-55907; filed original and 15 copies, 36 pages brief, 5 supplemental excerpts in 1 volume served on 1/3/92.

Date	Proceedings
1992	
1/7/92	MOTION by Appellee to dismiss the appeal; exhibits.
1/22/92	BRIEF by Appellants in opposition to Appellee's motion to dismiss appeal.
2/3/92	REPLY of Appellee in reply to Appellants' opposition to motion to dismiss.
2/14/92	ORDER by William A. Norris, Edward Leavy; Appellants' motion for an extension of time within which to file opposition to appellee's motion to dismiss the appeal is granted. The opposition shall be filed as of January 22, 1992, the date it was received. This appeal arises from an order remanding on abstention grounds. Because the remand order was not based on jurisdictional grounds, the prohibition on appellate review imposed by 28 U.S.C. 1447(d) does not apply. See <i>Thermtron Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336, 345-52. Accordingly, the motion to dismiss is denied. However, because it is not clear whether this appeal should be more properly treated as a petition for writ of mandamus, we refer the papers filed in connection with the motion to dismiss for lack of jurisdiction to the merits panel for such consideration as it deems appropriate. Appellants' opening brief and Appellee's answering brief has been filed. The due date for the reply brief set out in this court's November 6, 1991 order is vacated. The reply brief shall be due 14 days from the date of this order. This appeal is ready for calendaring.
3/20/92	REPLY BRIEF by Appellants; 16 pages.
8/27/92	ORDER by Deputy Clerk. Consolidated appeal no. 91-55907 is dismissed voluntarily with prejudice pursuant to the parties' stipulation.
1993	
9/1/93	CALENDARED: Pasadena November 5, 1993, 9:00 a.m.

Date	Proceedings
1993	
11/5/93	ARGUED AND SUBMITTED to Betty B. Fletcher, Harry Pregerson, William A. Norris.
1995	
2/2/95	OPINION filed by court: the District Court's remand order is vacated and the case is remanded for proceedings consistent with this opinion.
2/16/95	PETITION by Appellee for rehearing with suggestion for rehearing en banc; 15 pages, filed original and 40 copies.
2/27/95	ORDER by Betty B. Fletcher, Harry Pregerson, William A. Norris. Appellant is directed to file a response to Appellee's petition for rehearing and suggestion for rehearing en banc filed with this court on 2/16/95. The response shall not exceed 15 pages and shall be filed within 21 days of the date of this order.
3/21/95	RESPONSE by Appellant to petition for rehearing and suggestion for rehearing en banc.
5/19/95	ORDER by Betty B. Fletcher, Harry Pregerson, William A. Norris. The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.
5/31/95	MANDATE ISSUED.
8/17/95	NOTICE from Supreme Court: petition for certiorari filed Supreme Court No. 95-244 filed on 8/11/95.
10/20/95	NOTICE from Supreme Court: petition for certiorari granted on 10/16/95.

[Filed Nov. 26, 1985]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576323

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
v. *Applicant,*

HOLLAND-AMERICA INSURANCE COMPANY,
a Missouri corporation,
Respondent.

**ORDER APPOINTING CONSERVATOR
AND RESTRAINING ORDER**

The verified Application of the Insurance Commissioner of the State of California having been filed herein and it appearing to this court from said Application that said Commissioner has found Holland-America Insurance Company to be in such a condition that its further transaction of business will be hazardous to its policyholders, creditors, and the public,

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Holland-America Insurance Company, Respondent herein, and directed as such to conduct the business of Respondent or so much thereof as to said Conservator may seem appropriate; and said Conservator is authorized, in his discretion, to pay or defer payment of all claims and obligations against Respondent accruing prior to or subsequent to Applicant's appointment as Conservator;

2. That said Conservator forthwith take possession of all Respondent's assets, books, records and property, both real and personal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office, title to all of the property and assets of said Respondent, wheresoever situated, and all persons are hereby enjoined from interfering in any manner with the said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, governors, agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of its property or assets until further order of this court;

5. That all persons are hereby enjoined from maintaining or instituting any action at law or suit in equity, including but not limited to matters in arbitration, against said Respondent or against the said Conservator, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent, wheresoever situated;

7. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

8. That all funds including certificates of deposit and bank accounts in the name of Respondent in various banks in the State of California, and in other banks wheresoever situated, are hereby vested in the Conservator and subject to withdrawal upon his order only;

9. That all agents of Respondent and all brokers who have written business for Respondent make remittances of funds collected by them or in their hands to the Applicant as Conservator;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to Applicant as Conservator; that all persons are enjoined from using such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Conservator;

12. That the Conservator is authorized to pay for his costs in bringing and maintaining this action, and such other actions as are necessary to carry out his functions as Conservator.

DATED: Nov. 26, 1985

/s/ John L. Cole
Judge of the Superior Court

[Filed Nov. 26, 1985]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576324

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION NATIONAL INSURANCE COMPANY,
a California corporation,
Respondent.

**ORDER APPOINTING CONSERVATOR
AND RESTRAINING ORDER**

The verified Application of the Insurance Commissioner of the State of California having been filed herein and it appearing to this court from said Application that said Commissioner has found Mission National Insurance Company to be in such a condition that its further transaction of business will be hazardous to its policyholders, creditors, and the public.

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Mission National Insurance Company, Respondent herein, and directed as such to conduct the business of Respondent or so much thereof as to said Conservator may seem appropriate; and said Conservator is authorized, in his discretion, to pay or defer payment of all claims and obligations against Respondent accruing

prior to or subsequent to Applicant's appointment as Conservator;

2. That said Conservator forthwith take possession of all Respondent's assets, books, records and property, both real and peronal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office, title to all of the property and assets of said Respondent, wheresoever situated and all persons are hereby enjoined from interfering in any manner with the said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, governors, agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of its property or assets until further order of this court;

5. That all persons are hereby enjoined from maintaining or instituting any action at law or suit in equity, including but not limited to matters in arbitration, against said Respondent or against the said Conservator, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent wheresoever situated;

7. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

8. That all funds including certificates of deposit and bank accounts in the name of Respondent in various

banks in the State of California, and in other banks wheresoever situated, are hereby vested in the Conservator and subject to withdrawal upon his order only;

9. That all agents of Respondent and all brokers who have written business for Respondent make remittances of funds collected by them or in their hands to the Applicant as Conservator;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to Applicant as Conservator; that all persons are enjoined from using such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Conservator;

12. That the Conservator is authorized to pay for his costs in bringing and maintaining this action, and such other actions as are necessary to carry out his functions as Conservator.

DATED: Nov. 26, 1985

/s/ John L. Cole
Judge of the Superior Court

[Filed Nov. 26, 1985]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576325

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

ENTERPRISE INSURANCE COMPANY,
a California corporation,
Respondent.

**ORDER APPOINTING CONSERVATOR
AND RESTRAINING ORDER**

The verified Application of the Insurance Commissioner of the State of California having been filed herein and it appearing to this court from said Application that said Commissioner has found Enterprise Insurance Company to be in such a condition that its further transaction of business will be hazardous to its policyholders, creditors, and the public;

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Enterprise Insurance Company, Respondent herein, and directed as such to conduct the business of Respondent or so much thereof as to said Conservator may seem appropriate; and said Conservator is authorized, in his discretion, to pay or defer payment of all claims and obligations against Respondent accruing prior to or subsequent to Applicant's appointment as Conservator;

2. That said Conservator forthwith take possession of all Respondent's assets, books, records and property, both real and personal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office, title to all of the property and assets of said Respondent, wheresoever situated and all persons are hereby enjoined from interfering in any manner with the said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, governors, agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of its property or assets until further order of this court;

5. That all persons are hereby enjoined from maintaining or instituting any action at law or suit in equity, including but not limited to matters in arbitration, against said Respondent or against the said Conservator, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent wheresoever situated;

7. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

8. That all funds including certificates of deposit and bank accounts in the name of Respondent in various banks in the State of California, and in other banks wheresoever situated, are hereby vested in the Conservator and subject to withdrawal upon his order only;

9. That all agents of Respondent and all brokers who have written business for Respondent make remittances of funds collected by them or in their hands to the Applicant as Conservator;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to Applicant as Conservator; that all persons are enjoined from using such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Conservator;

12. That the Conservator is authorized to pay for his costs in bringing and maintaining this action, and such other actions as are necessary to carry out his functions as Conservator.

DATED: Nov. 26, 1985

/s/ John L. Cole
JOHN L. COLE
Judge of the Superior Court

[Filed Nov. 26, 1985]

**SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

No. C576416

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,
v.

MISSION REINSURANCE CORPORATION,
a California corporation,
Respondent.

**ORDER APPOINTING CONSERVATOR
AND RESTRAINING ORDER**

The verified Application of the Insurance Commissioner of the State of California having been filed herein and it appearing to this court from said Application that said Commissioner has found Mission Reinsurance Corporation to be in such a condition that its further transaction of business will be hazardous to its policyholders, creditors, and the public,

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Mission Reinsurance Corporation, Respondent herein, and directed as such to conduct the business of Respondent or so much thereof as to said Conservator may seem appropriate; and said Conservator is authorized, in his discretion, to pay or defer payment of all claims and obligations against Respondent accruing prior to or subsequent to Applicant's appointment as Conservator;

2. That said Conservator forthwith take possession of all Respondent's assets, books, records and property, both real and personal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office, title to all of the property and assets of said Respondent, wheresoever situated and all persons are hereby enjoined from interfering in any manner with the said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, governors, agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of its property or assets until further order of this court;

5. That all persons are hereby enjoined from maintaining or instituting any action at law or suit in equity, including but not limited to matters in arbitration, against said Respondent or against the said Conservator, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent, wheresoever situated;

7. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

8. That all funds including Certificates of Deposit and bank accounts in the name of Respondent in various banks in the State of California, and in other banks wheresoever situated, are hereby vested in the Conservator and subject to withdrawal upon his order only;

9. That all agents of Respondent and all brokers who have written business for Respondent make remittances of funds collected by them or in their hands to the Applicant as Conservator;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to Applicant as Conservator; that all persons are enjoined from using such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Conservator;

12. That the Conservator is authorized to pay for his costs in bringing and maintaining this action, and such other actions as are necessary to carry out his functions as Conservator.

DATED: Nov. 26, 1985

/s/ John L. Cole
Judge of the Superior Court

[Filed May 2, 1986]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576416

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION REINSURANCE CORPORATION,
a Missouri corporation,
Respondent.

**AMENDED ORDER APPOINTING CONSERVATOR
AND RESTRAINING ORDER**

The verified Application of the Insurance Commissioner of the State of California having been filed herein and it appearing to this court from said Application that said Commissioner has found Mission Reinsurance Corporation to be in such a condition that its further transaction of business will be hazardous to its policyholders, creditors, and the public,

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Mission Reinsurance Corporation, Respondent herein, and directed as such to conduct the business of Respondent or so much thereof as to said Conservator may seem appropriate; and said Conservator is authorized, in his discretion, to pay or defer payment of all claims and obligations against Respondent accruing prior to or subsequent to Applicant's appointment as Conservator;

2. That said Conservator forthwith take possession of all Respondent's assets, books, records and property, both real and personal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office, title to all of the property and assets of said Respondent, wheresoever situated and all persons are hereby enjoined from interfering in any manner with the said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, governors, agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of its property or assets until further order of this court;

5. That all persons are hereby enjoined from maintaining or instituting any action at law or suit in equity, including but not limited to matters in arbitration, against said Respondent or against the said Conservator, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent, wheresoever situated;

7. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

8. That all funds including Certificates of Deposit and bank accounts in the name of Respondent in various banks in the State of California, and in other banks wheresoever situated, are hereby vested in the Conservator and subject to withdrawal upon his order only;

9. That all agents of Respondent and all brokers who have written business for Respondent make remittances of funds collected by them or in their hands to the Applicant as Conservator;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to Applicant as Conservator; that all persons are enjoined from using such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Conservator;

12. That the Conservator is authorized to pay for his costs in bringing and maintaining this action, and such other actions as are necessary to carry out his functions as Conservator.

DATED: May 2, 1986

/s/ Vernon G. Foster
Judge of the Superior Court

[Filed Feb. 24, 1987]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576323

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

HOLLAND-AMERICA INSURANCE COMPANY,
a Missouri corporation,
Respondent.

**ORDER APPOINTING LIQUIDATOR
AND RESTRAINING ORDER**

The verified Application for Order of Liquidation of Respondent, Holland-America Insurance Company came on regularly for hearing on February 24, 1987, in Department 85 at 9:00 a.m., the Honorable Jerry K. Fields, judge presiding. Applicant appeared by his counsel, John K. Van De Kamp, Attorney General of the State of California, by Raymond Jue, Deputy Attorney General, there was an appearance by John Adams.

IT IS ORDERED THAT:

1. The Insurance Commissioner of the State of California is appointed in his official capacity as Liquidator of Respondent, Holland-America Insurance Company and directed to liquidate and wind up the affairs of Respondent in California and to act in all ways and exercise all powers necessary for the purpose of carrying out such order;

2. Title to all assets of Respondent now in the possession of the Insurance Commissioner as Conservator hereof, as well as title to any assets of said Respondent discovered hereafter located in California, is hereby vested in said Liquidator;

3. Said Liquidator, as such, is hereby authorized to pay as expenses of administration, all expenses heretofore incurred by the Conservator of Respondent and presently unpaid and is hereby authorized to pay the full amount of any checks or drafts which have been issued by the Conservator of Respondent and which are presently outstanding and unpaid when said checks or drafts are presented for payment;

4. The rights and liabilities of creditors, policyholders, shareholders, and all other persons interested in the assets of Respondent, including the State of California, be fixed as of the date of entry of this order;

5. Respondent and its officers, directors, agents and employees and all other persons are hereby enjoined and restrained from transacting any of the business of Respondent or the disposition of any of its assets or property;

6. All persons are hereby enjoined and restrained from interfering with the possession, title and rights of Applicant, as Liquidator, in and to the assets of Respondent and from interfering with the conduct of the liquidation in the winding up of the business of Respondent;

7. All persons are hereby enjoined from the waste of assets of Respondent;

8. All persons are hereby enjoined from instituting or prosecuting any action or proceeding against Respondent, or Applicant as Liquidator of Respondent, without the consent of this court obtained after reasonable notice to said Liquidator;

9. All persons are hereby enjoined from obtaining preferences, judgments, attachments or other liens, or

making any levy against Respondent or its assets without the consent of this court obtained after reasonable notice to said Liquidator;

10. All officers, directors, agents and employees of Respondent are hereby ordered to deliver to said Liquidator all assets, books, records, equipment and other property of said Respondent;

11. All funds and bank accounts in the name of Respondent, or Applicant as Conservator, are hereby vested in said Liquidator and said funds shall be subject to withdrawal from said banks upon the order of said Liquidator only;

12. All insurance agents and brokers are hereby ordered to account to the Liquidator of Respondent for all funds of Respondent held by them in their fiduciary capacity, as specified in Sections 1733, 1734 and 1735 of the Insurance Code, or due to Respondent, and directed to forward said funds to Applicant as Liquidator and said funds are vested in Applicant as Liquidator; and

13. Said Liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as Liquidator.

DATED: February 24, 1987.

/s/ Jerry K. Fields
JERRY K. FIELDS
Judge of the Superior Court

[Filed Feb. 24, 1987]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576324

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION NATIONAL INSURANCE COMPANY,
a California corporation,
Respondent.

**ORDER APPOINTING LIQUIDATOR
AND RESTRAINING ORDER**

The verified Application for Order of Liquidation of Respondent, Mission National Insurance Company came on regularly for hearing on February 24, 1987, in Department 86 at 9:00 a.m., the Honorable Ricardo Torres, judge presiding. Applicant appeared by his counsel, John K. Van De Kamp, Attorney General of the State of California, by Raymond Jue, Deputy Attorney General, there was no other appearance.

IT IS HEREBY ORDERED THAT:

1. The Insurance Commissioner of the State of California is appointed in his official capacity as Liquidator of Respondent, Mission National Insurance Company and directed to liquidate and wind up the affairs of Respondent in California and to act in all ways and exercise all powers necessary for the purpose of carrying out such order;

2. Title to all assets of Respondent now in the possession of the Insurance Commissioner as Conservator hereof, as well as title to any assets of said Respondent discovered hereafter located in California is hereby vested in said Liquidator;

3. Said Liquidator, as such, is hereby authorized to pay as expenses or administration, all expenses heretofore incurred by the Conservator of Respondent and presently unpaid and is hereby authorized to pay the full amount of any checks or drafts which have been issued by the Conservator of Respondent and which are presently outstanding and unpaid when said checks or drafts are presented for payment;

4. The rights and liabilities of creditors, policyholders, shareholders, and all other persons interested in the assets of Respondent, including the State of California, be fixed as of the date of entry of this order;

5. Respondent, its officers, directors, agents and employees and all other persons are hereby enjoined and restrained from transacting any of the business of Respondent or the disposition of any of its assets of property;

6. All persons are hereby enjoined and restrained from interference with the possession, title and rights of Applicant, as Liquidator, in and to the assets of Respondent and from interfering with the conduct of the liquidator in winding up of the business of Respondent;

7. All persons are hereby enjoined from the waste of assets of Respondent;

8. All persons are hereby enjoined from instituting or prosecuting any action or proceedings against Respondent, or Applicant as Liquidator of Respondent, without the consent of this court obtained after reasonable notice to said Liquidator;

9. All persons are hereby enjoined from obtaining preferences, judgments, attachments or other liens, or making any levy against Respondent or its assets without the consent of this court obtained after reasonable notice to said Liquidator;

10. All officers, directors, agents and employees of Respondent are hereby ordered to deliver to said Liquidator all assets, books, records, equipment and other property of said Respondent;

11. All funds and bank accounts in the name of Respondent, or Applicant as Conservator, are hereby vested in said Liquidator and said funds shall be subject to withdrawal from said banks upon the order of said Liquidator only;

12. All insurance agents and brokers are hereby ordered to account to the Liquidator of Respondent for all funds of Respondent held by them in their fiduciary capacity, as specified in Sections 1733, 1734 and 1735 of the Insurance Code, or due to Respondent, and directed to forward said funds to Applicant as Liquidator, and said funds are vested in Applicant as Liquidator; and

13. Said Liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as Liquidator.

DATED: February 24, 1987.

/s/ Ricardo Torres
RICARDO TORRES
Judge of the Superior Court

[Filed Feb. 24, 1987]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576325

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

ENTERPRISE INSURANCE COMPANY,
a California corporation,
Respondent.

ORDER APPOINTING LIQUIDATOR
AND RESTRAINING ORDER

The verified Application for Order of Liquidation of Respondent, Enterprise Insurance Company came on regularly for hearing on February 24, 1987, in Department 85 at 9:00 a.m., the Honorable Jerry K. Fields, judge presiding. Applicant appeared by his counsel, John K. Van De Camp, Attorney General of the State of California, by Raymond Jue, Deputy Attorney General, there were appearances by John Holmes, Teresa Ferguson, and G. Prose for opposing party.

IT IS ORDERED THAT:

1. The Insurance Commissioner of the State of California is appointed in his official capacity as Liquidator of Respondent, Enterprise Insurance Company and directed to liquidate and wind up the affairs of Respondent in California and to act in all ways and exercise all powers necessary for the purpose of carrying out such order;

2. Title to all assets of Respondent now in the possession of the Insurance Commissioner as Conservator hereof, as well as title to any assets of said Respondent discovered hereafter located in California, is hereby vested in said Liquidator;

3. Said Liquidator, as such, is hereby authorized to pay as expenses of administration, all expenses heretofore incurred by the Conservator of Respondent and presently unpaid and is hereby authorized to pay the full amount of any checks or drafts which have been issued by the Conservator of Respondent and which are presently outstanding and unpaid when said checks or drafts are presented for payment;

4. The rights and liabilities of creditors, policyholders, shareholders, and all other persons interested in the assets of Respondent, including the State of California, be fixed as of the date of entry of this order;

5. Respondent and its officers, directors, agents and employees and all other persons are hereby enjoined and restrained from transacting any of the business of Respondent or the disposition of any of its assets or property;

6. All persons are hereby enjoined and restrained from interfering with the possession, title and rights of Applicant, as Liquidator, in and to the assets of Respondent and from interfering with the conduct of the liquidation in winding up of the business of Respondent;

7. All persons are hereby enjoined from the waste of assets of Respondent;

8. All persons are hereby enjoined from instituting or prosecuting any action or proceedings against Respondent, or Applicant as Liquidator of Respondent, without the consent of this court obtained after reasonable notice to said Liquidator;

9. All persons are hereby enjoined from obtaining preferences, judgments, attachments or other liens, or

making any levy against Respondent or its assets without the consent of this court obtained after reasonable notice to said Liquidator;

10. All officers, directors, agents and employees of Respondent are hereby ordered to deliver to said Liquidator all assets, books, records, equipment and other property of said Respondent;

11. All funds and bank accounts in the name of Respondent, or Applicant as Conservator, are hereby vested in said Liquidator and said funds shall be subject to withdrawal from said banks upon the order of said Liquidator only;

12. All insurance agents and brokers are hereby ordered to account to the Liquidator of Respondent for all funds of Respondent held by them in their fiduciary capacity, as specified in Sections 1733, 1734 and 1735 of the Insurance Code, or due to Respondent, and directed to forward said funds to Applicants as Liquidator and said funds are vested in Applicant as Liquidator; and

13. Said Liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as Liquidator.

DATED: February 24, 1987.

/s/ Jerry K. Fields
JERRY K. FIELDS
Judge of the Superior Court

[Filed Feb. 24, 1987]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C576416

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
Applicant,

v.

MISSION REINSURANCE CORPORATION,
a Missouri corporation,
Respondent.

**ORDER APPOINTING LIQUIDATOR
AND RESTRAINING ORDER**

The verified Application for Order of Liquidation of Respondent, Mission Reinsurance Company came on regularly for hearing on February 24, 1987, in Department 86 at 9:00 a.m., the Honorable Ricardo Torres, judge presiding. Applicant appeared by his counsel, John K. Van De Kamp, Attorney General of the State of California, by Raymond Jue, Deputy Attorney General, there was no other appearance.

IT IS HEREBY ORDERED THAT:

1. The Insurance Commissioner of the State of California is appointed in his official capacity as Liquidator of Respondent, Mission Reinsurance Company and directed to liquidate and wind up the affairs of Respondent in California and to act in all ways and exercise all powers necessary for the purpose of carrying out such order;

2. Title to all assets of Respondent now in the possession of the Insurance Commissioner as Conservator hereof, as well as title to any assets of said Respondent discovered hereafter located in California is hereby vested in said Liquidator;

3. Said Liquidator, as such, is hereby authorized to pay as expenses of administration, all expenses heretofore incurred by the Conservator of Respondent and presently unpaid and is hereby authorized to pay the full amount of any checks or drafts which have been issued by the Conservator of Respondent and which are presently outstanding and unpaid when said checks or drafts are presented for payment;

4. The rights and liabilities of creditors, policyholders, shareholders, and all other persons interested in the assets of Respondent, including the State of California, be fixed as of the date of entry of this order;

5. Respondent, its officers, directors, agents and employees and all other persons are hereby enjoined and restrained from transacting any of the business of Respondent or the disposition of any of its assets or property;

6. All persons are hereby enjoined and restrained from interference with the possession, title and rights of Applicant, as Liquidator, in and to the assets of Respondent and from interfering with the conduct of the liquidator in winding up of the business of Respondent;

7. All persons are hereby enjoined from the waste of assets of Respondent;

8. All persons are hereby enjoined from instituting or prosecuting any action or proceedings against Respondent, or Applicant as Liquidator of Respondent, without the consent of this court obtained after reasonable notice to said Liquidator;

9. All persons are hereby enjoined from obtaining preferences, judgments, attachments or other liens, or

making any levy against Respondent or its assets without the consent of this court obtained after reasonable notice to said Liquidator;

10. All officers, directors, agents and employees of Respondent are hereby ordered to deliver to said Liquidator all assets, books, records, equipment and other property of said Respondent;

11. All funds and bank accounts in the name of Respondent, or Applicant as Conservator, are hereby vested in said Liquidator and said funds shall be subject to withdrawal from said banks upon the order of said Liquidator only;

12. All insurance agents and brokers are hereby ordered to account to the Liquidator of Respondent for all funds of Respondent held by them in their fiduciary capacity, as specified in Sections 1733, 1734 and 1735 of the Insurance Code, or due to Respondent, and directed to forward said funds to Applicant as Liquidator, and said funds are vested in Applicant as Liquidator; and

13. Said Liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as Liquidator.

DATED: February 24, 1987.

/s/ Ricardo Torres
RICARDO TORRES
Judge of the Superior Court

[Filed Feb. 9, 1990]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C751868

ROXANI GILLESPIE, INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA IN HER CAPACITY AS LIQUIDA-
TOR OF MISSION INSURANCE COMPANY, MISSION NA-
TIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE
COMPANY, MISSION REINSURANCE CORPORATION,
HOLLAND-AMERICA INSURANCE COMPANY,
Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY; AGF REINSURANCE
CORP.; AMERICAN UNION INSURANCE CO. OF NEW
YORK; ATLAS ASSURANCE COMPANY OF AMERICA;
EMPLOYERS MUTUAL LIABILITY INSURANCE CORP.;
HARBOR INSURANCE CO.; INA REINSURANCE COMPANY;
INSURANCE COMPANY OF NORTH AMERICA; LINCOLN
NATIONAL REINSURANCE CO.; NEW ENGLAND REIN-
SURANCE CORP.; NORTH AMERICAN CO. FOR PROPERTY
AND CASUALTY; NORTHWESTERN NATIONAL INSURANCE
CO.; PHOENIX ASSURANCE COMPANY OF NEW YORK;
R.L.I. INSURANCE; SECURITY MUTUAL CASUALTY CO.;
TRANSATLANTIC REINSURANCE CO.; TRINITY UNIVER-
SAL INSURANCE CO.; U.S. FIDELITY & GUARANTY CO.;
VICTORY REINSURANCE CO. OF AMERICA; ZENITH
INSURANCE COMPANY; and Does 1 thru 1000, inclusive
Defendants.

**COMPLAINT FOR DECLARATORY RELIEF;
SUIT ON CONTRACT; CONSPIRACY TO BREACH
AND TO COMMIT TORTIOUS BREACH AND
TORTIOUS BREACH OF THE IMPLIED COVENANT
OF GOOD FAITH AND FAIR DEALING;
CONSPIRACY TO COMMIT TORT AND TORTIOUS
DENIAL OF THE EXISTENCE OF CONTRACTS**

COMES NOW, the Plaintiff, Roxani Gillespie in her capacity as Liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation and Holland-America Insurance Company and makes this Complaint and for causes of action against the Named Defendants and Doe Defendants 1 through 1000 and alleges as follows:

PARTIES

1. Plaintiff, Roxani Gillespie, the Insurance Commissioner of the State of California, is the Court-appointed Liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation and Holland-America Insurance Company by orders of the Superior Court of the State of California for the County of Los Angeles in those certain cases entitled as follows: *The Insurance Commissioner of the State of California v. Mission Insurance Company*, Los Angeles Superior Court Case No. C572724; *The Insurance Commissioner of the State of California v. Mission National Insurance Company*, Los Angeles Superior Court Case No. C576321; *The Insurance Commissioner of the State of California v. Enterprise Insurance Company*, Los Angeles Superior Court Case No. C576325; *The Insurance Commissioner of the State of California v. Mission Reinsurance Company*, Los Angeles Superior Court Case No. C576416; and *The Insurance Commissioner of the State of California v. Holland-America Insurance Company*, Los Angeles Superior Court Case No. C576323.

2. Plaintiff Roxani Gillespie as Liquidator is vested with title to all assets, including causes of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation, and Holland-America Insurance Company (the "Mission Companies") and as such has the right to pursue the causes of action stated herein. The facts and circumstances giving rise to the allegations contained herein arise out of the same set of facts, circumstances and general reinsurance agreements in the lawsuit previously filed by Plaintiff herein, LASC Case No. C572724 currently pending in Department 67 of the above-entitled Court before the Honorable Kurt J. Lewin, the all-purpose judge in that action. The instant action was filed purely for procedural reasons and in form and substance is identical to the First Amended Complaint on file in LASC Case No. C572724.

3. The Named Defendants herein are insurance companies and/or associations of insurance companies who acted as reinsuring entities for the Mission Companies pursuant to certain written reinsurance agreements.

4. Plaintiff believes, and thereon alleges, that there are additional insurance companies and/or associations of insurance companies who reinsured business written by the Mission Companies and who refuse and continue to refuse to pay sums due under the reinsurance agreements to the Mission Companies, as will be described more fully below. The true names and capacities of these companies, sued herein under the fictitious names of Does 1 through 1000, are subject to the jurisdiction of this Court and are unknown to Plaintiff at the present time. Plaintiff will amend this complaint when and as such true names and capacities are ascertained. Doe Defendants 1 through 1000, and the Named Defendants herein are hereafter collectively referred to as "Defendants."

5. Defendants have failed and refused and continue to fail and refuse to pay sums due to the Mission Companies

in California as more particularly described herein below. Defendants are subject to the jurisdiction of the courts of California in that the reinsurance agreements provide for the submission of Defendants to the jurisdiction of any court of competent jurisdiction in the United States and some of the reinsurance agreements further appoint an agent for service of process in the State of California. Further, Defendants have done business in California and have purposefully availed themselves of insurance activities conducted in the State of California, in that, among other things, Defendants have received premiums from the Mission Companies, the Mission Companies being authorized to do business in California, Defendants have operated under sanction of California law and have caused payments to be delivered to the Mission Companies in California. Defendants have engaged systematically in an insurance business based upon companies being operated in the State of California and have purposely availed themselves of the benefits of business being done in this State and have availed themselves of the benefits of dealing with insurance companies operating in this State pursuant to a comprehensive state regulatory scheme. The business of insurance is of vital concern to this State and its public and the activities of Defendants both within and without the State have caused and are causing an effect within the State in that the Mission Companies have been damaged within the state by the acts and omissions of Defendants complained of herein. Further, these proceedings affect assets of the estates of the Mission Companies with respect to which this Court has exclusive jurisdiction which assets, in the form of the amounts alleged herein below, are being held by Defendants.

GENERAL FACTUAL STATEMENT

6. Beginning in the early 1970's, the Mission Companies entered into numerous written agreements with Defendants pursuant to which at all relevant times Defendants were and remain as reinsurers of insurance

policies issued directly by the Mission Companies to citizens of California and the other 49 states. Defendants became obligated to the Mission Companies to pay to the Mission Companies certain sums which sums were to be determined based upon losses experienced on various lines of insurance which were the subject of these agreements (the "Reinsurance Agreements").

7. All of the Reinsurance Agreements provide that Defendants shall pay to the Mission Companies all amounts due and owing for losses paid or payable by the Mission Companies on claims subject to the Reinsurance Agreements and provide for the recovery of certain other items of cost and expense.

8. With respect to the risks covered by the Reinsurance Agreements, there are three general categories of losses for which the Defendants are bound to pay. The first category involves policyholder claims made to the Mission Companies and paid by the Mission Companies and/or the various guarantee associations handling various of the policies of Mission Companies with respect to which Defendants have failed and refused and now fail and refuse to reimburse the Mission Companies even though Defendants are obligated to do so. The amounts due from Defendants in this connection exceed \$15,800,000.00 which is part of over \$400,000,000.00 due in this connection from all reinsurers and Plaintiff now seeks recovery from Defendants herein according to proof at trial.

9. The second category of such losses involves claims made against the Mission Companies with respect to which the Mission Companies have established case reserves and with respect to which the Mission Companies are, in the context, entitled to receive payment from Defendants. This amount due from Defendants in this connection exceeds \$16,000,000.00 which is part of over \$400,000,000.00 due in this connection from all rein-

surers and Plaintiff now seeks recovery from Defendants herein according to proof at trial.

10. The third category of losses involves a concept known as incurred-but-not-reported claims ("IBNR"). It is certain that an amount will be due from the Mission Companies to its insureds as a result of IBNR. It is possible, actuarially, to estimate with commercial reasonable certainty the amount of IBNR and thereby establish the amount due as IBNR from Defendants under the Reinsurance Agreements. This sum due from Defendants exceeds \$55,000,000.00 which is part of over \$1,600,000,000.00 due in this regard from all reinsurers and Plaintiff now seeks recovery from Defendants herein according to proof at trial. In the context as further described herein below, Plaintiff is entitled to recover from Defendants the present value of said IBNR and Plaintiff will present proof of such present value at trial or, alternatively, Plaintiff is entitled to have Defendants make provision for payment of IBNR according to proof at trial.

11. Defendants have failed and refused and continue to fail and refuse to pay or make provision for payment of these amounts. These amounts are more particularly ascertainable from Exhibit "A," attached hereto and incorporated herein for all purposes, which Exhibit sets forth specific amounts for the claims referred to in paragraphs eight, nine and ten above and which relate to data from which, in part, amounts in paragraph ten above are and can be calculated. Plaintiff reserves the right to amend Exhibit "A" after further discovery herein.

SPECIFIC FACTUAL ALLEGATIONS

12. In that it had become apparent to the California Department of Insurance that the continuing failure of Mission's reinsurers to pay balances due was placing a serious financial strain on the Mission Companies, in late 1985 the Department obtained orders of conservatorship

on all of the Mission Companies. Management of the Mission Companies, representatives of the Department and representatives of a group of insurance companies which had ceded reinsurance to the Mission Companies (the "participating ceding insurers") then began working on a plan to rehabilitate the Mission Companies.

13. A rehabilitation plan for the Mission Companies was announced by management of the Mission Companies on January 25, 1986, and formalized by a letter agreement dated February 10, 1986.

14. The rehabilitation plan contemplated Mission American Insurance Company assuming or reinsuring the insurance business of the Mission Companies and receiving the majority of the assets of the Mission Companies. Mission Insurance Company's obligations to the participating ceding insurers would be commuted in exchange for a surplus note issued by Mission American. The reinsurance recoverables would be assigned by Mission American to a trust to be distributed on infusion of capital into Mission American from American Financial Corporation.

15. In early March 1986, Defendants were apprised of the details of the proposed rehabilitation plan for the Mission Insurance Companies. Exhibit 1, attached hereto and incorporated herein by reference.

16. On March 12, 1986, a group of Mission's reinsurers, who later were to be represented by the law firm of Wilson, Elser, Moskowitz, Edelman and Dicker (the "WEMED defendants"), met in London and developed a strategy under which they "agreed to act together" in a "joint effort" to "continue to defer payment of balances due" to the Mission Companies. Part of this joint strategy was to commence an audit of a portion of Mission's reinsurance placed through Sayre & Toso, Inc. (the "Sayre & Toso business") and refuse payment on all of Mission's reinsurance on the pretext of awaiting the outcome of

the audit. At the time, Defendants, and the WEMED defendants, knew the amount of reinsurance balances due to the Mission Companies and were being regularly billed for balances by the Mission Companies, intermediaries and/or brokers. Exhibit 2, attached hereto and incorporated herein by reference.

17. On or about March 17, 1986, the Defendants were advised of the effort of the management of the Mission Companies and the Department of Insurance to rehabilitate the Mission Companies. The WEMED defendants concluded that this effort "does not change the strategy" to refuse payment of all reinsurance balances. Defendants continued to refuse payment in the face of requests for payment by the Mission Companies and in the face of the books and records of these Defendants showing "the latest position" on accounts due to the Mission Companies. Exhibit 3, attached hereto and incorporated herein by reference.

18. At their London meeting on March 12th, the WEMED defendants agreed to demand a joint audit of the Sayre & Toso business and agreed to hire the auditing firm of Norman Reitman and Company to conduct the audit. The Reitman Company established the format of the joint audit by letter of March 31, 1986, which audit was intended to "point out the degree of error, incorrect reporting and mishandling of the accounting" to put the WEMED defendants "in a position" with leverage to conduct settlement discussions with the Mission Companies. The Reitman Company's audit program was jointly drafted and guided by the WEMED defendants. The WEMED defendants did not expect the audit to produce any grounds to totally avoid their contractual obligations, but rather expected the audit to be useful leverage in settlement with the Mission Companies. Exhibit 4, attached hereto and incorporated herein by reference.

19. As of April 2, 1986, the WEMED defendants confirmed that the purpose of the Reitman audit was to "focus upon the potential degree of error" in the Sayre & Toso business, and to "key in" on "accuracy" and "whether any misrepresentations exist" before commencing settlement negotiations with the Mission Companies. The WEMED defendants therefore continued to pursue their joint strategy to refuse payments of all balances due to the Mission Companies and commence an audit of only the Sayre & Toso business to create a "favorable settlement climate." Exhibit 5, attached hereto and incorporated herein by reference.

20. At this time, the Defendants knew that the Mission Companies were in increasingly desperate financial shape due to the failure of the Defendants to pay reinsurance balances due. The WEMED defendants jointly continued to refuse all payments to the Mission Companies. Other Defendants either jointly or singly also refused to make any payments. The WEMED defendants believed that "any attempt at settlement negotiations prior to completing the [Reitman] audit would be premature and counterproductive unless reinsurers can supply us with the evidence of misrepresentation, fraud, concealment or negligence. Substantial deterioration in the figures in and of itself would not be enough to establish a favorable settlement climate." *Id.*

21. The WEMED defendants persisted in their joint strategy of refusing to pay any outstanding balance due to the Mission Companies. Exhibit 6, attached hereto and incorporated herein by reference.

22. Although the Mission Companies continued to request payment from the WEMED defendants through March, April and May 1986, the Defendants continued in their strategy and did not "agree to any requests for payment." The remaining Defendants continued to refuse payment either jointly or singly. The WEMED defend-

ants permitted the Reitman audit to proceed to look for any "pattern of errors, misrepresentations or omissions" on the Sayre & Toso business to provide the WEMED defendants with leverage over the financially troubled Mission Companies. Exhibit 7, attached hereto and incorporated herein by reference.

23. The WEMED defendants formed a "Steering Committee," established a legal and accounting fund and in May 1986 executed a Joint Cooperation Agreement to further their joint goals of refusing payments of all balances due to the Mission Companies. Further, the WEMED defendants devised a "detailed formula" to allocate costs and expenses among those party to the Joint Cooperation Agreement. During this time they jointly devised a formal cooperative audit strategy for the audit of the Sayre & Toso business and took the position that no payments would be made to the Mission Companies "until the audit is completed." Exhibits 7-12, attached hereto and incorporated herein by reference.

24. On May 14, 1986, the Reitman Company rendered its "Preliminary Informative Memorandum No. 1" (Exhibit 9, attached hereto and incorporated herein by reference) in which the Reitman Company outlined the voluminous records on the Sayre & Toso business, the special computer runs which would be required for "any kind of meaningful audit" and that "Mission's procedural operations are very sophisticated at the Home Office level." At the same time, while the WEMED defendants were being advised that the audit would require a lengthy review of Mission records and could not be swiftly concluded, the financial situation of the Mission Companies continued to deteriorate due to the failure of Defendants to pay balances due. Nevertheless, the WEMED defendants persisted in their joint strategy.

25. Although at the time they knew that the Reitman audit would involve a lengthy review of Mission files and

computer reports, and that the audit would not produce useful results, the WEMED defendants jointly represented to Mission management that it was their goal to complete the audit "as expeditiously as possible so that the settlement of all accounts which are validly and properly payable can be accomplished." The WEMED defendants knew that the desperate Mission management would rely on such false assurances of a rapid resolution of the balances due to the Mission Companies and possibly agree to a substantially discounted settlement in order to bring cash into the troubled companies. Exhibit 13, attached hereto and incorporated by reference.

26. Mission management requested the reinsurers "demonstrate their good intentions" by establishing a trust fund consisting of the paid losses outstanding and due to the Mission Companies by letter of June 5, 1986. Exhibit 14, attached hereto and incorporated herein by reference.

27. During June 1986, the WEMED defendants solicited other of Mission's reinsurers to join in the "co-operative and united effort" in order to improve the settlement and "bargaining position of the reinsurers." In fact, other reinsurers became clients of the WEMED firm after June 27, 1986, thereby adding to the number of reinsurers refusing to pay the Mission Companies and further weakening Mission's financial situation. Exhibit 15, attached hereto and incorporated herein by reference.

28. After the Reitman audit had commenced the WEMED defendants recognized that the sampling of files required "to present to a court in any trial of these issues" would have to be greater than the sampling Reitman contemplated by way of audit, but that it should be "sufficient to point out problems" and to use in an effort to force a settlement with Mission management. *Id.*

29. The WEMED defendants also believed that Mission's request for the establishment of a good faith trust

fund "would deter any allegation by Mission of a breach of contract." At this time, the WEMED defendants knew that "none of the treaties contain any provision specifically permitting the Reinsurers to refrain from payment based upon a dispute on the amounts individually." Nevertheless, the WEMED defendants continued in jointly and deliberately refusing to pay outstanding balances without any legal or factual basis and refused to establish a trust fund. *Id.*

30. In or about July 1986, the Defendants were updated on the status of the proposed rehabilitation plan for the Mission Companies. The Mission Companies continued to "press for payment of losses." The Defendants knowingly and without any factual or legal basis continued to refuse to pay to the weakened Mission Companies. The WEMED defendants jointly refused, insisting that no request for payment could be agreed to "until audit completed and full evaluation concluded." Exhibit 16, attached hereto and incorporated herein by reference.

31. In September 1986, the WEMED defendants held a meeting at the annual Monte Carlo Reinsurance Rendezvous where they received a report from the Reitman Company. Even though, on information and belief, this Report provided no concrete support for nonpayment, after this meeting they continued in their joint strategy of auditing the Sayre & Toso business and refusing to pay any balances due to the Mission Companies. Exhibit 17, attached hereto and incorporated herein by reference.

32. At or about the same time, the Commissioner in her capacity as Conservator of the Mission Companies wrote to all of Mission's reinsurers, including Defendants, requesting immediate payment of balances due. In that letter, the Commissioner advised all Defendants that "[T]o be successful, the rehabilitation plan, which benefits the industry and the public, requires the cooperation of all parties and most particularly, the receipt by Mission of

its reinsurance recoverables." Despite this request, and their knowledge that the rehabilitation plan required their payments, Defendants continued in refusing payments to the Mission Companies. Exhibit 18, attached hereto and incorporated herein by reference.

33. In early October 1986, the WEMED defendants from their own records compiled the balances due to the Mission Companies and yet jointly continued in their refusal to pay any losses. Exhibit 19, attached hereto and incorporated herein by reference.

34. Defendants were advised that "Mission is in a very poor cash position and there is a fear that the rescue plan will fail unless reinsurance proceeds are paid" and that the Commissioner requested a meeting with all of Mission's reinsurers, including the Defendants, to discuss outstanding payments. Exhibit 20, attached hereto and incorporated herein by reference.

35. At that meeting the Commissioner told Defendants of the Mission rehabilitation efforts and the necessity for them to pay balances due for the survival of the Mission Companies and the Defendants knew the key role they played in the survival of the Mission Companies. In deposition testimony elicited to date, the WEMED defendants have acknowledged that in late 1986 "we were aware of the need . . . for money in Mission . . . and hoped to reach an agreement because of it . . ." (Deposition of Jon Haralstad, May 23, 1989, pages 238-239). The WEMED defendants admit that they were apprised of the dire and critical situation of the Mission Companies during 1986 and knew their refusal to pay would cause the financial collapse of the Mission Companies. The WEMED defendants admit they "stood by their decision" not to pay and simply watched as the Mission Companies were forced into liquidation (Haralstad Deposition, pages 237 and 238; Deposition of Nigel Clark, March 15, 1989, pages 88-90; Deposition of Jean-Michel Pinto, March 15, 1989, pages 305-307).

36. Defendants understood at the time and understand today that their refusal to pay balances owed to the Mission Companies could result in extra-contractual damages being awarded against them, and they are willing to run that "risk." (Haralstad Deposition, pages 234-235; Clark Deposition, pages 88-89; Pinto Deposition, Pages 306-307; Deposition of Leonard Alliston, April 19, 1989, page 139).

37. After the meeting with the Commissioner, which occurred on October 9, 1986, the WEMED defendants held a meeting on October 22, 1986 in London to further discuss their joint strategy. The WEMED defendants understood that "Mission desperately needs cash to make the reorganization and rehabilitation plan work." The WEMED defendants knew that the Commissioner would serve reinsurers with a "financial damage law suit" if they withheld payment and Mission failed. Exhibit 21, attached hereto and incorporated herein by reference.

38. As of the October 22, 1986 meeting, the WEMED defendants did not believe that the Reitman audit would "turn up anything" allowing for recession. They recognized that they would "still have to pay" if no "gross negligence or fraud is indicated" and that the audit was expected only to uncover facts regarding problems with Sayre & Toso's claims handling rather than facts supporting recession. *Id.*

39. Defendants believed they could "take the opportunity made available by Mission's need for cash and negotiate a settlement or the [reinsurers] can stand by and watch Mission go under and then deal with the California Ins. Dept." Defendants understood that the Mission Companies were in a dramatically weaker bargaining position vis a vis the Defendants. *Id.*

40. The Reitman audit continued through November 1986 and the WEMED defendants continued in their joint strategy of non-payment. Exhibit 22, attached hereto and incorporated herein by reference.

41. On December 2, 1986, counsel for the Commissioner sent a letter to all Mission reinsurers, including Defendants, and advised them that "you hold in your collective power the success or failure of the many months of effort spent in attempting to rehabilitate these companies." Counsel urged Defendants to pay balances due to the Mission Companies and offered to settle all balances due under a formula contained in the correspondence. The Defendants continued to refuse to pay and refused to settle on the offered terms. Exhibit 23, attached hereto and incorporated herein by reference.

42. On December 18, 1986, the WEMED defendants met with counsel for Plaintiff to discuss potential settlement of their balances due from the reinsurers to the Mission Companies. The WEMED defendants were advised that the "passage of time and the deteriorating financial condition of Mission" were narrowing the options available to the Commissioner regarding Defendants and that their continuing refusal to pay would force the Companies into liquidation. Defendants were advised the Commissioner was unwilling to provide a "deep discount" in that there was no evidence of alleged "wrongdoing" on Mission's part. The WEMED defendants replied that they "could not even approach finalization of any commutation proposal" until they had "verifiable figures." The WEMED defendants recognized the extreme "financial pressure" facing Mission and that payment would "relieve that pressure." At this point the Reitman audit had been proceeding for nearly six months. Exhibit 24, attached hereto and incorporated herein by reference.

43. On December 28, 1986, the WEMED defendants were advised that Plaintiff had filed suit seeking payment of reinsurance balances due to the Mission Companies. The WEMED defendants expressed concern that "by making some payment, some of our negotiating strength is diminished." The WEMED defendants acknowledged this strategy was a "gamble" in that the "liquidator may

contend that reinsurers have caused the economic impairment of Mission and that the refusal to pay constitutes bad faith and is subject to an award of punitive damages." *Id.*

44. In this same communication, the WEMED defendants again acknowledge that "the strategy all along has been that we should not pay any losses pending an investigation and completion of certain phases of the Reitman audit." The WEMED defendants further acknowledged that "there is great danger in charges being made that the SORT reinsurers were instrumental in causing the total collapse of Mission." Despite all these warnings, their knowledge of their key role in the survival of Mission and the threat of the imminent collapse of the Mission Companies, Defendants deliberately continued to refuse to pay balances due. *Id.*

45. The WEMED defendants continued to cooperate in refusing to pay any balance due to the Mission Companies and to develop strategies to force the Commissioner into adversarial proceedings to collect the balances. Exhibit 25, attached hereto and incorporated herein by reference.

46. The Reitman audit report was due in early January 1987, and on December 29, 1986, the WEMED defendants were advised that "the audit will not be of great help for reinsurers" in their effort to uncover any fact to support an argument the contracts could be rescinded and their obligations to pay totally voided. Despite their knowledge that they had no facts to totally avoid their obligations, the WEMED defendants planned on using the report to "raise some defenses that may be used" in settlement negotiations with the Mission Companies. Exhibit 26, attached hereto and incorporated herein by reference.

47. Defendants nevertheless persisted in their refusal to pay the balances due to the Mission Companies. Ex-

hibit 27, attached hereto and incorporated herein by reference.

48. As a result of the Defendants' failure to pay balances due to the Mission Companies, and Mission's financial crisis arising from this failure, on February 2, 1987, the Commissioner sought and later received orders of liquidation for the Mission Companies.

49. As a result of the conduct of Defendants and the resulting liquidation, the Mission Companies have been damaged in that Defendants refused to pay the hundreds of millions of dollars in reinsurance recoverables due and the Mission Companies suffered financial collapse as a result of this refusal.

50. To date, Defendants continue in refusing payment of any balances due to the Mission Companies, and continue to jointly cooperate in this effort and in similar strategies to continue denying the validity of the Reinsurance Agreements and jointly refusing to honor their obligations under the Agreements.

FIRST CAUSE OF ACTION

(For Declaratory Relief Against All Defendants)

51. Plaintiff refers to each and every allegation in paragraphs 1 through 50, inclusive, and incorporates the same by reference as though fully recited herein.

52. An actual controversy has arisen between Plaintiff and Defendants concerning the rights of the parties under the Reinsurance Agreements in that Plaintiff and the Mission Companies have demanded that Defendants pay or make provision to pay the amounts described above. Defendants however deny that they are required to do so and have refused to pay or to make provision for payment as alleged above. An actual and justiciable controversy therefore exists between Plaintiff and Defendants concerning their respective rights under the contracts and a judicial determination and declaration is necessary and

appropriate at this time as to the rights of the parties under the Reinsurance Agreements in order that Plaintiff perform her statutory duties and in order that the innocent policyholders of the Mission Companies may be afforded their rights.

53. Plaintiff seeks a declaratory judgment of the Court determining the rights, duties and obligations by and between the Mission Companies and Defendants as to the repayment of losses, expenses and other recoverable items paid by the Mission Companies on claims subject to the Reinsurance Agreements referred to herein and as to the other two categories of losses covered by the Reinsurance Agreements and all other sums due to the Mission Companies thereunder.

SECOND CAUSE OF ACTION

(Suit on Contract Against All Defendants)

54. Plaintiff refers to each and every allegation in paragraphs 1 through 50, inclusive, and incorporates the same by reference as though again fully recited herein.

55. Defendants fail and refuse and have failed and refused to pay and/or to make provision for payment to the Mission Companies on the Reinsurance Agreements as described more fully above.

56. Plaintiff has performed under the Reinsurance Agreements and/or Plaintiff's performance under the contracts has been excused.

57. Defendants are therefore in breach of contract and Plaintiff has therefore been damaged.

58. Plaintiff hereby seeks payment from Defendants of the sums due under the Reinsurance Agreements, in an amount to be proven at trial. Further, Plaintiff is entitled to special and consequential damages for Defendant's breach of contract. When Defendants entered into the Reinsurance Agreements with the Mission Companies,

they knew that they were agreeing to reinsure risks ceded by the Mission Companies and to pay their share of losses incurred from these risks. As described above, at the time the Defendants knew that their failure to pay the balances due would cause great hardship, and perhaps the financial failure of the Mission Companies.

59. As described in greater detail above, Plaintiff and her representatives corresponded and met with Defendants and their agents or representatives during 1986 in an effort to obtain payments from Defendants of balances due. On a number of occasions, Plaintiff advised Defendants that if they failed to pay reinsurance balances, Mission would face financial ruin and be forced into liquidation. The deposition testimony elicited to date, in addition to the Exhibits attached hereto, all of which are incorporated herein, shows Defendants knew that their failure to pay reinsurance balances due to the Mission Companies would cause Mission's liquidation.

60. Despite these warnings, and despite their knowledge that they held the key to Mission's financial future in their hands, Defendants knowingly and intentionally withheld payments due under the Reinsurance Agreements.

61. Based upon this course of conduct, Plaintiff is entitled to special damages in an amount equivalent to the losses suffered by Mission as a result of the liquidation forced by Defendants' conduct, which amount is currently being calculated and which is anticipated to exceed \$2 billion and which amount will be proven at the time of trial.

THIRD CAUSE OF ACTION

(Conspiracy to Breach and to Commit Tortious Breach and Breach and Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing Against Does 500 through 1000)

62. Plaintiff refers to each and every allegation in paragraphs 1 through 50, inclusive, and incorporates the same by reference as though again fully recited herein.

63. Insurance companies supply a service affected with the public interest. The major motivation for the public to purchase insurance is to provide for security and peace of mind through the protection against calamity. This undertaking by an insurer to provide peace of mind and security against loss creates a special relationship with the insured.

64. The Mission Insurance Companies wrote property and casualty and workers' compensation insurance policies. These policies were issued to the public. Defendants, as reinsurers of the Mission Companies, by way of the Reinsurance Agreements, agreed to reinsure a portion of this business. Implied in all of these Agreements is a covenant by Defendants that they will act in good faith and deal fairly with the Mission Companies. When entering into these Agreements, Defendants knew that they were agreeing to reinsure policyholder risks ceded by the Mission Companies and to pay their share of losses incurred by these policyholders.

65. Defendants, as experienced reinsurance professionals, knew that their liability under the agreements arose from the insurance policies issued by the Mission Companies to the public. Testimony elicited to date from Defendants acknowledges that the reinsurers understood this fact (Deposition of John T. Jones, December 15, 1988, pages 65 and 71; Pinto Deposition, pages 254-256).

66. Defendants also knew that the Mission Companies could write insurance policies only to the extent the Mission Companies possessed appropriate statutory capital and surplus. Defendants knew that the Mission Companies purchased reinsurance to provide relief to Mission's capital and surplus and thereby enable the Mission Companies to write more insurance policies to the insurance buying public as provided in Insurance Code § 922.2. Defendants knew that the Mission Companies and the

insurance regulator relied on Defendants to honor the Reinsurance Agreements in evaluating their capital and surplus in deciding to write policies to the public.

67. Defendants knew that if they jointly and in a cooperative effort refused to honor the Reinsurance Agreements, it would place the Mission Companies in extreme financial distress and cause the Mission Companies to cease writing policies. Defendants knew their joint conduct would create dramatically unequal bargaining position vis a vis the Mission Companies. Defendants knew that such distress and unequal position could result in the downfall of the Mission Companies and that the ultimate financial burden of the insolvency would fall on policyholders of the Mission Companies and the insurance-buying public in general.

68. As more fully set forth above, in breach of the implied covenant of good faith and fair dealing these Defendants have committed the acts alleged herein, knowingly, intentionally, unreasonably and wrongfully for the purpose of withholding benefits due to the Mission Companies under the Reinsurance Agreements by, among other things, developing a joint strategy to refuse payment of balances due in the face of repeated requests for payment and the certain knowledge that their refusal to honor the Reinsurance Agreements would bring about the downfall of the Mission Companies and bring extreme financial burden on the policyholders and the insurance-buying public.

69. As is amply demonstrated by Exhibits 1-27, attached hereto and incorporated herein by reference, these Defendants knew that they could develop a joint strategy of refusing to pay the Mission Companies and could by this concerted effort bring about the downfall of the Mission Companies. The Defendants did just that by entering into a Joint Cooperation Agreement, forming a Steering Committee, instructing the Norman Reitman Company to conduct an audit of the Sayre & Toso busi-

ness only and jointly refusing to pay all balances due with no legal or factual basis for the refusal.

70. Defendants have knowingly, intentionally and unreasonably failed to meet their obligations with regard to the balances tendered by the Mission Companies which arise from the thousands of legitimate claims presented by the innocent policyholders of the Mission Companies.

71. Defendants acted and continue to act maliciously and oppressively in jointly developing a strategy and implementing that strategy in refusing to pay any balances due under the Reinsurance Agreements solely for the purpose of illegally, improperly, and maliciously increasing their profits at the expense of the Mission Companies and their innocent policyholders.

72. Defendants acted and continue to act contemptibly in jointly banding together in a coordinated effort and thereby denying and refusing to pay the amounts due pursuant to the Reinsurance Agreements solely for the purpose of illegally, improperly, and maliciously forcing the Plaintiff into litigation to collect legitimate balances due pursuant to the Reinsurance Agreements all to the detriment of the Mission Companies and their innocent policyholders.

73. As described in detail above, Defendants are not dealing fairly with the Mission Companies. Such conduct is unconscionable and Defendants knew at the time they entered into their joint strategy that a risk they would run was Plaintiff bringing litigation and a claim for extra-contractual damages. That Defendants know that the innocent policyholders of the Mission Companies are dependant upon the payment of the balances due under the Reinsurance Agreements for the satisfaction of their claims renders their conduct even more despicable.

74. Defendants, by the continuing course of conduct as more fully set forth above, have breached and continue to breach their duty of good faith and fair dealing

causing substantial damage to the Mission Companies and ultimately to the innocent policyholders in an amount to be shown at trial.

75. Plaintiff believes that the acts and conduct of the Defendants and each of them were committed with the intent to vex, annoy and injure the Mission Companies and the innocent policyholders and with reckless disregard of the consequences to the Mission Companies and the policyholders. The conduct of these Defendants was carried out and is being carried out by officers, directors or managing agents of the Defendants and exemplary damages are therefore appropriate. Plaintiff is thus entitled to recovery from Defendants exemplary damages in an amount to be proven at trial.

FOURTH CAUSE OF ACTION

(Conspiracy to Commit Tort and the Tortious Denial of the Existence of the Reinsurance Agreement Against Does 500 through 1000)

76. Plaintiff incorporates by reference paragraphs 1 through 50 and 63 through 74 above and incorporates them by reference as though fully set forth herein.

77. As more fully set forth above, these Defendants knew of the dire financial condition of the Mission Companies. The primary reason for the liquidation of the Mission Companies is the refusal of Defendants to honor the Reinsurance Agreements.

78. The seriousness of the financial situation of the Mission Companies as a result of Defendants' conduct placed the parties in a dramatically unequal bargaining position with regard to honoring the Reinsurance Agreements. These Defendants were repeatedly advised at the time that the financial condition of the Mission Companies made the Mission Companies and their innocent policyholders especially vulnerable to the harm contemplated by the Defendants in their refusal to pay the

balances due. Defendants were well aware of this vulnerability and in deposition testimony elicited to date as described above, Defendants acknowledge their understanding that the risk of this course of conduct could be extra-contractual damages due from them to Plaintiff.

79. Defendants denied at the time and continue to deny any liability under the Reinsurance Agreements without any good faith belief in the propriety of their denials as more specifically described above, including but not limited to the following conduct:

a) Jointly refusing and continuing to refuse to honor all of the Reinsurance Agreements but commencing an audit on only the Sayre & Toso portion of the business;

b) Jointly refusing and continuing to refuse to honor the Reinsurance Agreements with the knowledge that the Agreements did not permit such conduct;

c) Jointly refusing and continuing to refuse to honor the Reinsurance Agreements allegedly on the basis of information contained in the Reitman Report while knowing that the Report "would not be of great help" in legally or factually supporting their complete refusal to honor all of the Agreements

d) Jointly refusing to honor the Reinsurance Agreements with the certainty that such conduct would push the Mission Companies into liquidation and bring great financial burden on the Mission policyholders and the insurance-buying public; and

e) Jointly refusing and continuing to refuse to honor the Agreements with no legal or factual basis for such a refusal and forcing Plaintiff to initiate litigation regarding Defendants' obligations under the Agreements.

80. The documents attached as Exhibits 1-27, incorporated herein, outline Defendants' joint strategy to cooperate in refusing to honor the Reinsurance Agreements. Defendants have jointly stonewalled Plaintiff in a con-

certed effort in refusing to honor the Agreements and pay the balances due with the intent of forcing the Plaintiff into litigation to collect the balances due under the Reinsurance Agreements.

81. The documents attached hereto as Exhibits 1-27, as more fully described above and incorporated herein, demonstrate that Defendants' acts and conduct described above were made with the intent to coerce the Plaintiff and the Mission Companies and ultimately the innocent policyholders to accept a sum less than the sum actually due from the Defendants in full payment of the Defendants' obligations.

82. Testimony of some Defendants elicited to date demonstrates that some Defendants actually knew, and the others should have known, that the ultimate results of their actions would be to injure the thousands of innocent policyholders of the Mission Companies and the Mission estates, which injury has occurred. Plaintiff is therefore entitled to damages according to proof at trial.

83. The acts and conduct of these Defendants described in detail above and in Exhibits 1-27, incorporated herein, and each of them were committed with the intent to vex, annoy and injure the Mission Companies and the innocent policyholders with the reckless disregard of the consequences to the Mission Companies and the policyholders. The conduct of these Defendants was carried out and is being carried out by officers, directors or managing agents of the Defendants and exemplary damages are therefore appropriate. Plaintiff is thus entitled to recover from Defendants exemplary damages in an amount to be proven at trial.

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, as follows:

1. For a declaration of the rights of the parties under the Reinsurance Agreements and a declaration stating amounts that Defendants are obligated to pay to Plaintiff,

on behalf of the Mission Companies; the amount currently due and owing from each Defendant to the Mission Companies on losses paid or payable by the Mission Companies, including paid losses and case reserves, and that Defendants have the obligation to pay the present value of IBNR or to make provision for payment of IBNR and to pay future amounts as they come due for IBNR;

2. On Count Two, for the amounts due on losses paid and payable for costs, expenses and other recoverable items in an amount to be proven at trial and for special damages in an amount to be determined at trial;

3. On Count Three, for damages according to proof at trial;

4. On Count Three, for punitive damages in an amount to be proven at trial;

5. On Count Four, for damages according to proof at trial;

6. On Count Four, for punitive damages in an amount to be proven at trial;

7. For costs of suit herein;

8. For reasonable attorneys' fees; and

9. For such other and further relief as the Court may deem just and proper.

Dated: February 8, 1990

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C751868

(Title Omitted in Printing)

NOTICE OF RELATED CASES

Plaintiff Roxani Gillespie, Insurance Commissioner of the State of California, in her capacity as Liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation and Holland-America Insurance Company, files this Notice of Related Cases pursuant to Los Angeles Superior Court local Rule 1103.6.1. This case involves the efforts by the Commissioner to recover assets of the estates of the Mission Insurance Companies, specifically, reinsurance recoverables owed to those estates. Presently, there are consolidated actions pending in this Court before the Honorable Kurt J. Lewin, Department 67, who is the all-purpose judge assigned to the Mission Liquidation proceedings which have the lead case number of C572724. In form and substance this matter is virtually identical to one of those consolidated matters, Case No. C629709, in which action the Commissioner also seeks recovery of reinsurance recoverables owed to these estates. It would entail a substantial duplication of the Court's time and effort if these matters were heard by different judges.

Dated: February 8, 1990

JOHN K. VAN DE KAMP
Attorney General of the
State of California

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By: /s/ Melissa S. Kooistra
MELISSA S. KOOISTRA
Attorneys for Plaintiff

[Filed Apr. 25, 1990]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C572724

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
v. *Petitioner,*
MISSION INSURANCE COMPANY,
a California corporation,
Respondent.

Case No. C576324

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
v. *Applicant,*
MISSION NATIONAL INSURANCE COMPANY,
a California corporation,
Respondent.

Case No. C576416

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
v. *Applicant,*
MISSION REINSURANCE CORPORATION,
a Missouri corporation,
Respondent.

Case No. C576323

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
v. *Applicant,*
HOLLAND-AMERICA INSURANCE COMPANY,
a Missouri corporation,
Respondent.

Case No. C576325

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
v. *Applicant,*
ENTERPRISE INSURANCE COMPANY,
a California corporation,
Respondent.

Case No. C634774

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
v. *Applicant,*
MISSION AMERICAN INSURANCE COMPANY,
a California corporation,
Respondent.

Case No. C682377

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,
v. *Applicant,*
COMPAC INSURANCE COMPANY,
a California corporation,
Respondent.

Case No. C683233

ROXANI GILLESPIE, INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA, IN HER CAPACITY AS LIQUIDATOR
OF MISSION INSURANCE COMPANY,

v. *Plaintiff,*

ABEILLE-PAIX REASSURANCES, *et al.*,
Defendants.

Case No. C629709

ROXANI GILLESPIE, INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA, IN HER CAPACITY AS LIQUIDATOR
OF MISSION INSURANCE COMPANY, MISSION NATIONAL
INSURANCE COMPANY, ENTERPRISE INSURANCE COM-
PANY, MISSION REINSURANCE CORPORATION, HOLLAND-
AMERICA INSURANCE COMPANY,

v. *Plaintiffs,*

ABEILLE-PAIX (L'), *et al.*,
Defendants.

FINAL ORDER OF REHABILITATION

IT IS HEREBY FOUND AND ORDERED AS
FOLLOWS:

1. Roxani Gillespie, Insurance Commissioner of the State of California, in her capacity as domiciliary Liquidator of Mission Insurance Company, Mission National Insurance Company and Enterprise Insurance Company, as ancillary liquidator of Holland-America Insurance Company and Mission Reinsurance Corporation, and as conservator of Mission American Insurance Company and Compac Insurance Company (hereinafter "the Receiver") has complied with the provisions of that certain Order Of Rehabilitation, Establishment of Hearing Date and Notice

Procedures entered in these proceedings (the "Preliminary Order") to which reference is hereby made for further detail. The provisions of the said Preliminary Order are hereby reaffirmed and continued except to the extent directly inconsistent with the provisions of this Order. All terms used herein, unless otherwise stated, shall have the same meaning as they have in the Agreement of Reorganization, Rehabilitation and Restructuring (the "Rehabilitation Agreement").

2. The Court finds that the Receiver has complied with the notice provisions of paragraph 4 of the Preliminary Order and that due, fair, sufficient and proper notice of the Hearing of the Receiver's Motion for Instructions and Motion for Approval of Agreement of Reorganization, Rehabilitation and Restructuring (the "Receiver's Motion") was provided to all persons and entities entitled thereto.

3. Full and fair opportunity was afforded to all persons and entities appearing either in person or by counsel and to all other persons and entities interested in these proceedings to present such comments, suggestions, arguments and objections as they might desire and to present such relevant evidence as they may desire with regard to the Receiver's Motion, to the Preliminary Order, to the commencement or conduct of these proceedings, to the Rehabilitation Agreement, the Partial Settlement Agreement (as defined below) or to the transactions contemplated and described therein.

4. The Rehabilitation Plans, the Partial Settlement Agreement and the transactions contemplated therein are a reasonable exercise of the state's police power, through the Receiver, and are not arbitrary, capricious or improperly discriminatory.

5. The Court has fully considered all comments, suggestions, arguments and objections that were presented at the Hearing and all objections to the Rehabilitation

Plans which were made or which could have been made at the Hearing and all such objections are hereby, in every respect and in all things, overruled. The Receiver's Motion, the Rehabilitation Plans described therein, and the transactions contemplated in the Rehabilitation Agreement described therein are hereby granted and approved.

6. The Receiver is hereby authorized to proceed to close the transactions set out in the Rehabilitation Agreement and, without further order of this Court, to perform all of the obligations, terms, conditions, provisions thereof, and to take all such actions and execute all such other and further documents, including but not limited to assignments, documents of title and any other document of any kind or nature as may be necessary or convenient to close the said transactions and to effectuate the purpose and intent of the Rehabilitation Plans.

7. This Court continues and reaffirms its assumption of exclusive and continuing jurisdiction over all of the Transferred Assets of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company and Mission Reinsurance Corporation (hereinafter, collectively, the "Mission Insurance Subsidiaries") Mission American Insurance Company and Compac Insurance Company (hereinafter, collectively, "Mission American") and hereby continues such assertion and assumption of jurisdiction to the exclusion of all others and, further, asserts and continues to assume sole and exclusive jurisdiction to administer the Transferred Assets and to determine the validity or invalidity of any and all claims to or affecting such assets. Further, without limitation of this Court's jurisdiction as a matter of law, the Court also retains jurisdiction with respect to the Rehabilitation Agreement, the Partial Settlement Agreement and with respect to any and all transactions contemplated therein, including, but not limited to the adjudication of any and all disputes arising out of or in connection with the terms thereof or the transactions contemplated therein.

8. The Trusts of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company and the Mission American Trust shall be administered by the Insurance Commissioner of the State of California and her successors in office, *ex officio*, as Trustee. The Trustee may appoint one or more Deputy Trustees and Counsel for the Trusts. The Trusts of Holland-America Insurance Company and Mission Reinsurance Corporation shall be administered, in accordance with the Agreement Between Liquidators dated July 1, 1988 and in accordance with the terms of the Trusts, and the Missouri Director of Insurance in his capacity as domiciliary Receiver (the "Director") shall be Trustee. All current work in progress regarding the Mission Insurance Companies and Mission American and the benefits of all past work shall be transferred to and preserved for the benefit of the Trusts.

9. With respect to the Transferred Assets of the Mission Insurance Companies and Mission American, this Court specifically finds that all rights, remedies or causes of action possessed by the Receiver or the Director, whether currently existing or arising in the future, are preserved and transferred to the Trusts, including, but not limited to, the causes of action for reinsurance recoverables and bad faith asserted in the *Abeille-Paix* Litigation and the claims asserted in the Collection Litigation, and that such rights, remedies and causes of action and all other claims shall continue without any change in form or substance as before this Court's approval of the Rehabilitation Agreement.

10. Actual notice was provided to the guaranty association, guaranty fund or other similar entity of each state of the Hearing, the Receiver's Motion, the Rehabilitation Agreement and the Rehabilitation Plans contained therein. All obligations, liabilities and other rights and duties of those guaranty associations, guaranty funds or similar entities of the several United States to the policy-

holders and claimants of the Mission Insurance Companies shall continue unabated in conjunction with this Court's approval of the Rehabilitation Agreement and the Rehabilitation Plans contained therein and there shall be no change, abrogation, alteration or other modification of the obligations and rights of these guaranty associations as a result of this Court's order or the transactions contemplated in the Rehabilitation Agreement or the Rehabilitation Plans.

11. All persons and entities are hereby enjoined from instituting or maintaining any action at law or suit in equity of any kind or nature, including, but not limited to matters in arbitration, against the Trusts of the Mission Insurance Subsidiaries, or the Mission American Trust, the Receiver, the Director, the Trustees, their Deputy Trustee(s), their Counsel or any of their agents, employees, consultants or anyone acting under their direction, and from attaching or executing upon or taking any legal proceedings against any of the Transferred Assets of the Mission Insurance Subsidiaries or Mission American and from doing any act interfering with the conduct of the business of the Trusts by the Trustees or with the dominion and control of the Trustees over these Transferred Assets and from interfering with any provision of this Order or the Rehabilitation Agreement or the transactions contemplated in connection therewith, except after an order of this Court, obtained after reasonable notice to the Trustees.

12. At such time as the Commissioner notifies this Court that all conditions precedent to closing the contemplated transactions have occurred, and that she has been satisfied as to all related tax issues, then: (a) Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company and Mission Reinsurance Corporation shall be released, discharged, and dismissed from the current liquidation proceedings pending before

this Court free of any claims and liabilities of any kind whatsoever and such liquidation proceedings then will be terminated as to these companies. These proceedings shall continue as to the Trust estates of these companies which trust estates shall function as liquidating insurance entities subject to the Commissioner's powers under the Insurance Code; (b) Mission American Insurance Company and Compac Insurance Company shall be released, discharged, and dismissed from the current conservatorship proceedings pending before this Court free of any claims and liabilities of any kind whatsoever and such conservatorship proceedings then will be terminated as to these companies. These proceedings shall continue as to the Trust estates of these companies which trust estates shall function as liquidating insurance entities subject to the Commissioner's powers under the Insurance Code; and (c) the names of the Mission Insurance Subsidiaries and Mission American shall be changed as follows: (i) the name of Mission Insurance Company shall be changed to Danielson Insurance Company, (ii) the name of Mission National Insurance Company shall be changed to Danielson National Insurance Company; (iii) the name of Enterprise Insurance Company shall be changed to Danielson-Heffernan Insurance Company; (iv) the name of Holland-America Insurance Company shall be changed to Danielson-Rhein Insurance Company; (v) the name of Mission Reinsurance Corporation shall be changed to Danielson Reinsurance Corporation; (vi) the name of Mission American Insurance Company shall be changed to Danielson American Insurance Company; and (vii) the name of Compac Insurance Company shall be changed to Danielson-Whitman Insurance Company.

13. The Partial Settlement Agreement dated as of December 13, 1989 between, among others, the Receiver, Director and the Settling Cross-Defendants (the "Partial Settlement Agreement") is approved and, in such connection, at such time as the Receiver notifies this Court that all conditions precedent to closing the contemplated

transactions have occurred, and that she has been satisfied as to the tax issues, then the claims to be released by the Receiver and the Director in Paragraph 3 thereof will be dismissed with prejudice and the Receiver's indemnity claims as provided in Paragraph 4 thereof will be dismissed without prejudice.

/s/ Kurt J. Lewin
HON. KURT J. LEWIN

DATED: Apr. 25, 1990 Judge of the Superior Court

[Proof of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.

ROXANI GILLESPIE, INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA, IN HER CAPACITY AS LIQUIDATOR
OF MISSION INSURANCE COMPANY, MISSION NATIONAL
INSURANCE COMPANY, ENTERPRISE INSURANCE COM-
PANY, MISSION REINSURANCE CORPORATION, HOLLAND-
AMERICA INSURANCE COMPANY,
Plaintiff,

v.

ALLSTATE INSURANCE COMPANY; AGF REINSURANCE
CORP.; AMERICAN UNION INSURANCE CO. OF NEW
YORK; ATLAS ASSURANCE COMPANY OF AMERICA;
EMPLOYERS MUTUAL LIABILITY INSURANCE CORP.;
HARBOR INSURANCE CO.; INA REINSURANCE COMPANY;
INSURANCE COMPANY OF NORTH AMERICA; LINCOLN
NATIONAL REINSURANCE CO.; NEW ENGLAND REINSUR-
ANCE CORP.; NORTH AMERICAN CO. FOR PROPERTY AND
CASUALTY; NORTHWESTERN NATIONAL INSURANCE
CO.; PHOENIX ASSURANCE COMPANY OF NEW YORK;
R.L.I. INSURANCE; SECURITY MUTUAL CASUALTY CO.;
TRANSATLANTIC REINSURANCE CO.; TRINITY UNIVER-
SAL INSURANCE CO.; U.S. FIDELITY & GUARANTY CO.;
VICTORY REINSURANCE CO. OF AMERICA; ZENITH
INSURANCE COMPANY; and Does 1 thru 1000, inclusive,
Defendants.

NOTICE OF REMOVAL OF CIVIL ACTION
TO THE PARTIES HERETO AND THEIR AT-
TORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Allstate Insurance Company (hereinafter "Allstate") hereby removes this action from the Superior Court of the State of California for the County of Los Angeles to the United States District Court for the Central District of California. The grounds for removal are as follows:

1. Allstate is named as defendant in a civil action filed in the Superior Court for the State of California for the County of Los Angeles, Case No. C 751868, entitled "*Roxani Gillespie, Insurance Commissioner of the State of California, in her capacity as liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation, Holland-America Insurance Company vs. Allstate Insurance Company; AGF Reinsurance Corp.; American Union Insurance Co. of New York; Atlas Assurance Company of America; Employers Mutual Liability Insurance Corp.; Harbor Insurance Co.; INA Reinsurance Company; Insurance Company of North America; Lincoln National Reinsurance Co.; New England Reinsurance Corp.; North American Co. for Property and Casualty; Northwestern National Insurance Co.; Phoenix Assurance Company of New York; R.L.I. Insurance; Security Mutual Casualty Co.; Transatlantic Reinsurance Co.; Trinity Universal Insurance Co.; U.S. Fidelity & Guaranty Co.; Victory Reinsurance Co. of America; Zenith Insurance Company; and Does 1 thru 1000, inclusive.*" Petitioner was served with process in this case on August 2, 1990.

2. At the time of commencement of said action and at all times thereafter, Allstate was and still is a corporation incorporated under the laws of the State of Illinois, with its principal places of business in Illinois.

3. At the time of commencement of said action, plaintiff was and still is a citizen of California.

4. Although fictitiously-designated Defendants Does 1 through 1000 are referred to in the Complaint, such

fictitiously-designated Defendants are to be disregarded for purposes of diversity pursuant to 28 U.S.C. § 1441 (a).

5. This action is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1332(a)(2) and is one which Allstate is entitled to remove to this Court pursuant to 28 U.S.C. § 1441(c), in that the matter in controversy exceeds the sum of fifty thousand dollars (\$50,000), exclusive of interest and costs; the action is between citizens of different states; and this action is properly removable by Allstate because the claims alleged in the Complaint as to Allstate are "separate and independent" from the claims alleged against other, non-diverse defendants. The only claims asserted in the Complaint against Allstate, for alleged breach of reinsurance agreements entered into by Allstate and the Mission Group of Insurance Companies, allege a different wrong and seek recovery for a different injury than the claims alleged against the other defendants, who are sued for alleged breaches of separate reinsurance agreements to which Allstate was and is not a party.

6. Allstate hereby files this Notice of Removal of Civil Action within thirty days of its receipt on August 2, 1990 of the initial pleading setting forth the claim for relief upon which the action is based and within one year of the commencement of the action pursuant to 28 U.S.C. §§ 1446(a) and (b).

7. Pursuant to 28 U.S.C. § 1445(a), attached hereto as Exhibits A and B, respectively, are copies of the Summons and Complaint served upon Allstate in the above-referenced case. Attached hereto as Exhibit C is a copy of a Notice of Related Case therein. Attached hereto as Exhibits D and E, respectively, are Plaintiff's First Set of Interrogatories Directed to Defendant Allstate Insurance Company and Plaintiff's First Set of Demands for Inspection of Documents to Defendant Allstate Insurance Company. The pleadings attached hereto as Exhibit A

through E, inclusive, constitute all the process and pleadings served upon Allstate in the above-referenced Superior Court action.

WHEREFORE, Defendant Allstate hereby removes to this Court the above-referenced action pending against it in the Superior Court of the State of California, County of Los Angeles.

DATED: August 30, 1990

MUNGER, TOLLES & OLSON
MELVYN H. WALD
JOSEPH D. LEE

By /s/ Joseph D. Lee
JOSEPH D. LEE
Attorneys for Defendant
Allstate Insurance Company

[Exhibits A and B—Summons and Complaint in
Gillespie v. Allstate, LASC Case No. C751868,
omitted in printing.]

[Exhibit C—Notice of Related Case in
Gillespie v. Allstate, LASC Case No. C751868,
omitted in printing.]

[Exhibits D and E—Discovery propounded on Allstate in
Gillespie v. Allstate, LASC Case No. C751868,
omitted in printing.]

[Filed Sep. 10, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

NOTICE OF MOTION AND MOTION OF ALLSTATE
INSURANCE COMPANY TO COMPEL ARBITRATION
AND STAY PROSECUTION

TO THE INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA, TO ALL OTHER PAR-
TIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 1, 1990, at 10:00 a.m. or as soon thereafter as the matter may be heard, in Courtroom 9 of the above-entitled Court, located at 312 North Spring Street, Los Angeles, California, Defendant Allstate Insurance Company ("Allstate"), will and hereby does move for an order compelling arbitration of this action insofar as it is asserted against Allstate Insurance Company and otherwise staying the prosecution of this action as against Allstate. This motion is made pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-9, on the ground that the reinsurance agreements at issue in this action, insofar as the action is stated against Allstate, provide for binding arbitration of any disputes thereunder.

This motion is based on the accompanying Memorandum of Points and Authorities and Declaration of David Brodnan, on the [Proposed] Order Compelling Arbitration and Staying Prosecution lodged herewith, on the pleadings and papers on file herein, and on such further matters as may be presented in a reply memorandum or at the hearing on this motion.

DATED: September 7, 1990

MUNGER, TOLLES & OLSON
MELVIN H. WALD
JOSEPH D. LEE

By /s/ Joseph D. Lee
JOSEPH D. LEE
Attorneys for Defendant
Allstate Insurance Company

[Filed Sep. 10, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION OF ALLSTATE INSURANCE
COMPANY TO COMPEL ARBITRATION AND
STAY PROSECUTION

I.

INTRODUCTION

Defendant Allstate Insurance Company ("Allstate") seeks an order compelling arbitration of a dispute between it and the California Insurance Commissioner, as liquidator of four members of the Mission Group of Insurance Companies. The dispute arises from Allstate's having been both reinsured by and a reinsurer of the Mission Group under a number of reinsurance agreements entered into between 1961 and 1985. As reinsurer, Allstate owes reinsurance balances of approximately \$7 million to the Mission Group; as a reinsured, Allstate is due reinsurance balances of roughly \$13 million from the Group. Allstate has asserted its right to set off the balances due it against any sums due to the Mission Group, as provided for by section 1031 of the California Insurance Code. The Commissioner disputes this position and seeks to compel payment from Allstate without setoff.

With a handful of exceptions, each of the reinsurance agreements between Allstate and the Mission Group provides for arbitration of any dispute between them. By this motion, Allstate seeks to enforce these express contractual terms. As demonstrated below, the Federal Ar-

bitration Act and the strong federal policy of encouraging the arbitration of disputes mandates the entry of an order compelling arbitration here. Indeed, the arbitration of reinsurance disputes is particularly to be encouraged. The types of issues presented are unique to the reinsurance context, so that experienced industry arbitrators, as required under the agreements, are particularly well suited to resolve reinsurance disputes. For precisely this reason, the reinsurance industry for decades has almost uniformly followed arbitration as a course for resolving this very kind of dispute. Not to compel arbitration would contravene not only the parties' express intention under the reinsurance agreements at issue but also unambiguous provisions of the Federal Arbitration Act.

The Mission Group's agreement to submit this dispute to arbitration is fully binding on the California Insurance Commissioner. As demonstrated below, several decisions have held that statutory liquidators of an insolvent insurer must submit to arbitration disputes arising under pre-liquidation arbitration agreements, just like those here. The rationale of these decisions is compelling and is equally applicable here: the Commissioner stands in the Mission Group's shoes, and has no greater power than the Mission Group would have to avoid its arbitration agreements. For each of the foregoing reasons, the Court should compel arbitration of this action.

II.

FACTUAL BACKGROUND

A. *The Reinsurance Agreements.*

Between 1962 and 1984, Allstate and the Mission Group entered into a large number of agreements which provided for the sharing of certain insurance risks between them. The agreements fall into two basic categories: (1) a series of agreements pursuant to which Allstate (through its Reinsurance Division) reinsured the Mission Group,

and (2) agreements between the Mission Group and Northbrook Excess and Surplus Insurance Co. ("NESCO"), formerly a wholly-owned subsidiary of Allstate that was merged into Allstate in January 1985, under which the Mission Group reinsured Allstate.

The first category of agreements included approximately 26 reinsurance treaties (contracts) under which classes of business written by Mission Group affiliates were reinsured in part by Allstate, as well as several thousand facultative certificates under which a single risk written by a Mission Group company was reinsured in part by Allstate. (Declaration of David S. Brodnan filed herewith, ¶ 5.) Also included in this first category are a number of "retrocession" agreements under which the Mission Group assumed a portion of reinsurance provided by Allstate to other primary companies, *i.e.*, where Mission was effectively reinsuring Allstate. (*Id.*) All of the treaties, facultative certificates, and retrocession agreements provide for binding arbitration, except a few very early facultative certificates. (*Id.* ¶¶ 6-7)¹ As of March 1987, Allstate calculated that balances of approximately \$7 million were due the Mission Group under these reinsurance agreements, including reserves. (*Id.*, ¶ 5.)

In the reinsurance agreements comprising the second category, Mission Insurance Co., one of the Mission Group companies, agreed to reinsure obligations of NESCO. Mission Insurance Co. and NESCO entered into approximately 41 reinsurance treaties, principally covering umbrella liability and excess liability business written by NESCO. (Brodnan Declaration, ¶ 2.) Allstate was also a party to at least two of these treaties. (*Id.*) In addition to this treaty business, NESCO and MIC entered into a number of facultative certificates under which a single

¹ If the Court orders arbitration under those reinsurance agreements containing arbitration provisions, Allstate would stipulate also to submit to arbitration any disputes arising under the relatively few, early contracts that did not contain such provisions.

risk written by NESCO was reinsured in part by MIC. (*Id.*) While some of the facultative certificates did not contain arbitration provisions, such clauses were included in each of the larger reinsurance treaties. (*Id.*, ¶ 3.) As of March 1987, Allstate calculated that it was owed approximately \$13 million from the Mission Group under these reinsurance agreements. (*Id.*, ¶ 4.) The great majority of the sums due Allstate arise under the treaties between NESCO and the Mission Group, all of which contain arbitration provisions. (*Id.*) The balances due Allstate under agreements containing arbitration provisions are substantially more than the \$7 million that Allstate calculates is due the Mission Group.

B. *Procedural History.*

On October 31, 1985, the Commissioner filed an application in Los Angeles Superior Court for an order appointing it conservator of Mission Insurance Co., alleging that this company had become insolvent. The Court appointed the Commissioner conservator on that date. Thereafter, the Commissioner was also appointed conservator of the other Mission Group affiliates on whose behalf this suit has been brought. When it became apparent that the assets of these Mission Group companies were insufficient to allow for their rehabilitation, the Commissioner's status was changed to that of liquidator and she began proceedings to liquidate the Mission Group affiliates named as plaintiffs in this case.

The Commissioner is in dispute with a large number of the Mission Group's reinsurers regarding reinsurance balances that are claimed by the Mission Group. In December 1986, the Commissioner filed suit in Los Angeles Superior Court against a number of these reinsurers. In December 1989, just before the three-year period for effecting service had run, the Commissioner attempted unsuccessfully to serve Allstate as a defendant in the Superior Court case. The Superior Court quashed service on Allstate, and the Commissioner thereafter filed the present

action. Only one of the other defendants in the present case, INA Reinsurance Corporation, has been served and appeared.

On August 31, 1990, Allstate removed this action to this Court on the grounds that the claims asserted against it are separate and independent from the claims asserted against other defendants, and that there is diversity between Allstate and the plaintiff. This is precisely the type of case for which the removal statute is designed. Without the right of removal, foreign reinsurers such as Allstate would face the prospect of litigating a politically charged case in state court where one of the parties is a state officer suing in her official capacity. Immediately upon removing the case to this Court, Allstate is moving to compel arbitration of its reinsurance disputes with Mission's liquidator, and otherwise to stay prosecution of this action as against Allstate.

III.

ARGUMENT: THE COURT SHOULD COMPEL ARBITRATION

A. *The Parties' Arbitration Agreements Unambiguously Require Arbitration Of This Dispute.*

In entering into the reinsurance treaties described above, Allstate and the Mission Group agreed to arbitrate any "differences arising between the contracting parties with reference to any transactions under this Agreement." (See Exhibit A to Brodnan Declaration, page 12.) With a handful of exceptions, similar or even broader provisions are included in each of the several thousand reinsurance agreements entered into by Allstate and Mission. (Brodnan Decl., ¶¶ 2, 3, 5-7 and Exhibits A-E thereto.) These provisions unambiguously require arbitration of all disputes, including Allstate's obligations to the Mission Group and Allstate's right to set off sums due Allstate from the Group.

1. *Both Federal And California Law Strongly Favor Arbitration And Require That Arbitration Agreements Be Broadly Construed.*

In its decision in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984), the United States Supreme Court ruled that the Federal Arbitration Act ("FAA") governs the issue of arbitrability of disputes under any agreement to arbitrate that affects interstate commerce.² Thus, the Supreme Court in *Southland* held that "the underlying issue of arbitrability" in such a case is "a question of substantive federal law." 465 U.S. at 12, 104 S.Ct. at 859. See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353 (1985) (in determining whether a dispute is subject to arbitration, the Court is to apply "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [Federal Arbitration] Act") (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983)). Accordingly, federal law controls the issue of whether Allstate's claims to a setoff are subject to arbitration. As demonstrated below, however, the issue of which law controls here is essentially moot as both federal and California law require arbitration.

² The reinsurance agreements at issue here are contracts "evidencing a transaction involving commerce" with section 2 of the FAA, 9 U.S.C. § 2. See, e.g., *Ainsworth v. Allstate Insurance Co.*, 634 F.Supp. 52, 55-56 (W.D. Mo. 1985) (reinsurance agreements were contracts "evidencing a transaction involving commerce" within the FAA). Indeed, as the *Ainsworth* court noted, "that the agreements involve insurance may be enough to establish the interstate commerce connection." *Id.* at 55. Accord *Bernstein v. Centaur Insurance Co.*, 606 F.Supp. 98, 101 (S.D.N.Y. 1984) ("insurance is business in interstate commerce" under FAA); see also *United States v. South Eastern Ass'n*, 322 U.S. 533, 539-53, 64 S.Ct. 1162, 1166-73 (1944) (fire insurance business is interstate commerce under Commerce Clause and Sherman Act).

The courts have consistently held that the strong policy favoring arbitration requires that agreements to arbitrate be broadly construed. The FAA, "both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and 'not substitute [its] own views of economy and efficiency' for those of Congress." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 1241 (1985). In light of this policy:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1353 (1960). As the Supreme Court more recently observed:

'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. at 626, 105 S.Ct. at 3353-54 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 24-25, 103 S.Ct. at 941-42).

California decisions are fully in accord with the foregoing rules. E.g., *Bos Material Handling, Inc. v. Crown Controls Corp.*, 137 Cal.App.3d 99, 105, 186 Cal.Rptr. 740 (1982) ("In California, the general rule is that arbitration should be upheld unless it can be said with as-

insurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute").

Under the above standard, even tort claims—including intentional tort claims—must be arbitrated unless manifestly beyond the parties' arbitration agreement. *See, e.g., Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986) (citing *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 406-07, 87 S.Ct. 1801 (1967)). Again the California decisions are in accord:

In the particular situation [such as that here] where contracts provide arbitration for "any controversy . . . arising out of or relating to the contract . . ." the courts have held such arbitration agreements sufficiently broad to include tort, as well as contractual, liabilities so long as the tort claims "have their roots in the relationship between the parties which was created by the contract."

Bos Material Handling, Inc. v. Crown Controls Corp., 137 Cal.App.3d at 105 (quoting *Berman v. Dean Witter & Co.*, 44 Cal.App.3d 999, 1003, 119 Cal.Rptr. 130 (1975)); accord *Tate v. Saratoga Savings & Loan Ass'n*, 216 Cal.App.3d 843, 855, 265 Cal.Rptr. 440 (1989). Likewise, statutory claims, such as claims under the Racketeer Influenced and Corrupt Organization Act (RICO) and the federal securities laws, must be submitted to arbitration when they fall within the scope of a contractual agreement to arbitrate, unless Congress has expressly created an exception to the Federal Arbitration Act. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (ordering arbitration of claims under Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987) (compelling arbitration of RICO claims and claims under Securities Exchange Act of 1934).

2. Under The Foregoing Standard, The Dispute Presented Here Is Within The Scope Of The Parties' Agreements To Arbitrate.

There can be no dispute whether the claims asserted in this case fall within the scope of the parties' arbitration agreements. The Commissioner seeks to recover reinsurance balances that have accrued under reinsurance agreements pursuant to which Allstate reinsured members of the Mission Group. Allstate seeks to set off balances that are due it under other reinsurance agreements pursuant to which Mission acted as Allstate's reinsurer. These claims lie at the very heart of the contracts of reinsurance at issue in this case. It is difficult to imagine a clearer instance of a dispute concerning rights under the reinsurance agreements. Although citation of authority is hardly necessary, the cases have found that such disputes fall within the scope of arbitration agreements akin to those here. *E.g., Ainsworth v. Allstate Insurance Co.*, 634 F. Supp. 52, 53-56 (W.D. Mo. 1985) (receiver of insolvent insurers must arbitrate claim against reinsurer in view of arbitration agreements contained in reinsurance treaties); *cf. Market Insurance Corp. v. Integrity Insurance Co.*, 188 Cal.App.3d 1095, 233 Cal.Rptr. 751 (1987) (holding that arbitration clause in two general agency agreements applies to an insurance agent's action against an insurance company to collect commissions under the contracts).

For the foregoing reasons, the Court should compel arbitration of all claims asserted in this action as between the Commissioner and Allstate, unless the Commissioner somehow is not bound by the Mission Group's agreement to submit this dispute to binding arbitration. For the reasons set forth in the following section of this memorandum, the Commissioner cannot avoid the Mission Group's express agreement to arbitrate this dispute, and arbitration accordingly should be ordered.

B. Mission's Agreement To Arbitrate Is Fully Binding On The Commissioner.

Under both federal and California law, the Commissioner is subject to the arbitration agreements contained in the reinsurance agreements between Allstate and the Mission Group.

Ainsworth v. Allstate Insurance Co., 634 F.Supp. 52 (W.D. Mo. 1985), discussed above, addressed this precise issue on facts closely similar to those of the present case. In *Ainsworth*, the Director of the Missouri Division of Insurance, as domiciliary receiver of two insolvent Missouri insurance companies, brought an action "to recover payment of reinsurance funds allegedly due under written contracts between the insolvent insurers and defendant." 634 F.Supp. at 53. Those contracts each contained an arbitration provision providing that "[s]hould any difference of opinion arise between the Reinsurer and the Company which cannot be resolved in the normal course of business with respect to the interpretations of this Agreement or the performance of the respective obligations of the parties under this Agreement, the difference shall be submitted to arbitration." *Id.* Finding that the Federal Arbitration Act governed the arbitrability of the dispute, the federal court had no hesitation in concluding that the matter had to be submitted to contractual arbitration. *Id.* at 57. See also *Piffath v. District 1199, National Union of Hospital Health Care Employees*, 98 L.R.R.M. 2606 (E.D.N.Y. 1978) (commissioner appointed as liquidator of nursing home is bound by nursing home owner's arbitration agreement with union representing home's employees).

Just a few weeks ago, the Ohio Court of Appeals reached precisely this conclusion in *Fabe v. Columbus Insurance Co.*, No. 89AP-869, 1990 Ohio App. LEXIS 2650 (June 26, 1990), a copy of which is attached hereto as Exhibit A. There, the Ohio Superintendent of Insurance, as liquidator of Columbus Insurance Co.

(CIC), was seeking to recover approximately \$500,000 under reinsurance agreements issued by two reinsurers. The reinsurers moved to compel arbitration under arbitration agreements virtually identical to those contained in the reinsurance agreements between Allstate and the Mission Group. The trial court granted the motion, and the Superintendent appealed. The Ohio Court of Appeals affirmed:

The dispute which defendants seek to have resolved by arbitration in this case will not affect the priority of claims of creditors of CIC. Rather, plaintiff, as liquidator, brought . . . an action against defendants to recover money allegedly owed to CIC. While it is true that the resolution of the dispute will have an impact on the amount of money plaintiff has to pay the creditors of CIC, arbitration of that dispute will not adversely affect any party to the liquidation proceeding.

Id.

Another Court reached the same conclusion in *Universal Marine Insurance Co., Ltd. v. Beacon Insurance Co.*, 592 F.Supp. 948 (W.D.N.C. 1984). There the Court had ordered arbitration of a lawsuit against two insurers. After this order was entered, one of the insurers, Cherokee Insurance Co., was declared insolvent and a conservator for it was appointed. Cherokee moved to stay the arbitration, arguing that the District Court should abstain from asserting jurisdiction, in view of the pendency of state court insolvency proceedings, and accordingly should vacate the order compelling arbitration. The District Court denied the motion, rejecting the suggestion that the pendency of the state court insolvency proceedings required that the federal court abstain from the action or otherwise reconsider its order compelling arbitration. 592 F.Supp. at 954-55.

The foregoing decisions are consistent with the status of the Insurance Commissioner under the California In-

insurance Code. As several California decisions have recognized, the Insurance Commissioner, when acting as a conservator or liquidator of an insolvent insurance company, has duties in the nature of a receiver. *E.g.*, *Caminetti v. Pacific Mutual Life Insurance Co.*, 22 Cal.2d 344, 354, 139 P.2d 908, *cert. denied*, 320 U.S. 802 (1943); *Anderson v. Great Republic Life Insurance Co.*, 41 Cal.App.2d 181, 106 P.2d 75 (1940). It has long been the law that "[a] receiver sues only on a cause of action of the parties or estate represented, and is subject to the same defenses which would have been available against them." 4 B. Witkin, *California Procedure, Pleading* § 127 at 160 (1985); *see also Allen v. Ramsay*, 179 Cal.App.2d 843, 854, 4 Cal.Rptr. 575 (1960) ("A receiver occupies no better position than that which was occupied by the person or party for whom he acts and the receiver takes the property and the rights of one for whom he was appointed in the same condition and subject to the same equities as existed before his appointment and any defense good against the original party is good against the receiver"). Thus, the Commissioner's power to avoid enforcement of an arbitration agreement can be no greater than that of Mission, in whose shoes she must stand.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, does not lead to a contrary result. The McCarran-Ferguson Act provides in relevant part that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The Ninth Circuit, however, has expressly held that the McCarran-Ferguson Act is inapplicable to state insurance liquidation statutes. *State of Idaho ex rel. Soward v. United States*, 858 F.2d 445, 452-53 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 2062 (1989). There the Ninth Circuit held:

Once rendered insolvent and placed in the hands of a liquidator, an insurance company no longer is involved in risk protection . . . In such a situation, the state is no longer regulating the traditional business of insurance, and thus, has exceeded the boundaries within which the McCarran-Ferguson Act frees it from preemption by general federal statutes.

858 F.2d at 452. *Accord Gordon v. United States*, 846 F.2d 272, 273 (4th Cir.) (per curiam), *cert. denied*, 488 U.S. 954 (1988) ("the liquidation of an insolvent insurance company and the determination of the priority of payment of claims against the insolvent do not constitute the 'business of insurance' within the meaning of the McCarran-Ferguson Act").

Moreover, while the *Soward* case is dispositive of the issue, several decisions have specifically held that the McCarran-Ferguson Act does not limit application of the FAA or otherwise prevent an order compelling arbitration of insurance disputes. *E.g.*, *Miller v. National Fidelity Life Insurance Co.*, 588 F.2d 185, 187 (5th Cir. 1979) ("the McCarran-Ferguson Act does not bar application of the Federal Arbitration Act to insurance contracts"); *Hart v. Orion Insurance Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971) ("the McCarran-Ferguson Act does not bar the application of the Federal Arbitration Act" to a suit for payment of benefits under disability policy); *Hamilton Life Insurance Co. v. Republic National Life Insurance Co.*, 408 F.2d 606, 611 (2d Cir. 1969) (same).

Indeed, several decisions have specifically held that the McCarran-Ferguson Act is no bar to an order under the FAA directing the arbitration of claims by an insolvent insurer against its reinsurers—the precise context presented here. *E.g.*, *Ainsworth v. Allstate Insurance Co.*, 634 F.Supp. 52, 56-57 (W.D. Mo. 1985) (ordering arbitration of suit by Director of Missouri Division of Insurance notwithstanding Missouri's "comprehensive scheme

to wind up the affairs of an insolvent insurance company," since the Missouri liquidation statute did not expressly exclude arbitration); cf. *Bernstein v. Centaur Insurance Co.*, 606 F.Supp. 98, 101-02 (S.D.N.Y. 1984) ("[I]f New York has a law that *specifically prohibits* arbitration in disputes involving the insurance business, arbitration may be precluded"; otherwise, the FAA mandates arbitration notwithstanding the McCarran-Ferguson Act (emphasis supplied)).³

C. *Arbitration Of Reinsurance Disputes Is Particularly Appropriate.*

That the present dispute concerns rights and obligations under reinsurance agreements makes arbitration particularly suitable. More than twenty years ago it was observed that "[i]t is the general practice and practically the uniform custom to provide in a [reinsurance] treaty for the arbitration of disputes arising out of the terms of the treaty." K. Thompson, *Reinsurance* (4th ed. 1966) at 140. The federal courts, moreover, have routinely and repeatedly compelled arbitration of reinsurance disputes arising under such arbitration agreements. For instance,

³ A handful of decisions rendered by the Southern District of New York reached a contrary result. E.g., *Washburn v. Corcoran*, 643 F.Supp. 554 (S.D.N.Y. 1986). These cases, of course, are flatly inconsistent with the Ninth Circuit's decision in *Soward*, and therefore cannot be dispositive here. The Southern District of New York decisions are distinguishable in any event. The cases rely on the New York Court of Appeals' ruling in *Knickerbocker Agency v. Hotz*, 4 N.Y.2d 245, 173 N.Y.S.2d 602, 149 N.E.2d 885 (1958), which construed the New York liquidation statute to invalidate arbitration provisions as against an insolvent insurer's liquidator. E.g., *Washburn v. Corcoran*, 643 F.Supp. at 557 ("As the highest court of New York has ruled that arbitration is incompatible with the commands of [the liquidation statute], it necessarily follows that enforcement of a federal statute requiring arbitration would defeat this provision of the state statute"). In contrast, no California court has considered the issue of whether arbitration is consistent with the California liquidation statute, much less held that it is not.

in *Houston General Insurance Co. v. Realex Group, N.V.*, 776 F.2d 514 (5th Cir. 1985), the Court of Appeals reversed a District Court order which had refused to compel arbitration under the FAA of a suit identical to that here: one brought by an insurer against its reinsurer seeking to recover balances due on a policy of reinsurance. 776 F.2d at 516-17. Indeed, the Ninth Circuit ordered arbitration of a reinsurance dispute as early as 1928. *Pacific Indemnity Co. v. Insurance Co. of North America*, 25 F.2d 930 (9th Cir. 1928).

The near-universality of arbitration agreements in the reinsurance industry has resulted from a number of factors. Among other things, arbitration offers a relatively prompt, expeditious method for determining the reinsurer's obligation, if any, to pay reinsurance balances in dispute. Also, resolution of reinsurance disputes involves both specialized terminology and a system of accounting that is unique to the insurance industry. Indeed, reinsurance disputes are so idiosyncratic that reinsurance arbitration agreements typically "require the arbitrators to be recognized authority in the field in which the case arises." K. Thompson, *Reinsurance*, at 140. Many of the arbitration agreements at issue here contain just such a provision, requiring that the "arbitrators shall be executive officers of insurance or reinsurance companies or an attorney specializing in insurance law." (See Exhibit A to Brodnan Declaration, page 12.)

Arbitration before reinsurance experts is appropriate for another reason: reinsurance treaties typically provide that the rights and duties thereunder will be determined by a business-oriented "honorable undertaking" standard, and not by legal standards applicable to other contract disputes. As Professor Thompson explains:

It is the general provision that the reinsurance treaty shall be interpreted as an *honorable agreement* rather than a legal contract. The whole underlying purpose of the arbitration clause is to provide a means to

solve difficulties in the way gentlemen in good faith work out their troubles without litigation.

K. Thompson, *Reinsurance* at 141 (emphasis in original). For obvious reasons, this standard is better carried into effect by a panel of industry experts than by a judicial trier of fact. Again, the arbitration agreements here typically contain such a provision, stating that the reinsurance contracts shall be interpreted "as an honorable engagement rather than a merely legal obligation." (See Exhibit A to Brodnan Declaration, page 12.)

Each of the foregoing reasons make arbitration particularly appropriate here. The determination of Allstate's and the Mission Group's conflicting claims would involve terminology and an accounting system that are unique to the reinsurance context. Accounting and actuarial issues will be particularly important here since the reinsurance balances asserted by Allstate and Mission consist largely of liabilities for losses projected years into the future. Those balances, arising under several thousand reinsurance agreements, total some \$20 million. Judicial resolution of this dispute would put the parties to extraordinary burden and expense, not to mention the expenditure of this Court's resources.

For the foregoing reasons, the Court should compel arbitration of the claims asserted against Allstate in this action.⁴

⁴ Likewise, the Court should issue an order staying prosecution of this action as against Allstate. Such an order is appropriate, if not mandated, by section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, which provides that a court "shall" stay a civil action when it is ordered to arbitration. See generally *Thompson v. Zavin*, 607 F.Supp. 780, 782 (C.D. Cal. 1984).

IV.

CONCLUSION

As demonstrated above, both federal and California law guarantee Allstate's right to arbitrate its dispute with the Mission Group and the Commissioner. This Court should therefore compel Mission and the Commissioner to submit this dispute to arbitration, as the parties expressly agreed in the reinsurance agreements that are the subject of this action.

DATED: September 10, 1990

MUNGER, TOLLES & OLSON
MELVYN H. WALD
JOSEPH D. LEE

By /s/ Joseph D. Lee
JOSEPH D. LEE
Attorneys for Defendant
ALLSTATE INSURANCE COMPANY

[Exhibit A—*Fabe v. Columbus Ins. Co.*, 1990 Ohio App. Lexis 2650, omitted in printing.]

[Proof of Service omitted in printing.]

[Filed Sep. 10, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

DECLARATION OF DAVID S. BRODNAN
IN SUPPORT OF MOTION OF ALLSTATE
INSURANCE COMPANY TO COMPEL ARBITRATION
AND STAY PROSECUTION

I, DAVID S. BRODNAN, declare and state:

1. I am employed by Allstate Insurance Company ("Allstate") as Assistant Vice President, Assistant Secretary, and Assistant General Counsel. I make this declaration based on my personal knowledge derived in part from review of Allstate's business records, which records were made and maintained in the ordinary course of Allstate's business, were made at the time of the transactions they reflect, and were made as a record of transactions that actually took place. If called as a witness, I could and would testify competently to the facts stated herein.

A. *The Mission Group As Allstate's Reinsurer.*

2. From on or about August 1974 to or about September 1982, Northbrook Excess and Surplus Insurance Company ("NESCO"), formerly a wholly-owned subsidiary of Allstate which was merged into Allstate in January 1985, was engaged in the business of writing excess and surplus types of risks in the State of California and elsewhere. (Initially, NESCO wrote business under the name

"Northbrook Insurance Co."; this name was changed to NESCO in 1978.) NESCO entered into approximately 41 treaties of reinsurance with Mission Insurance Co. ("MIC"), a member of the Mission Group of Insurance Companies ("the Mission Group"). Under the NESCO-MIC treaties, MIC agreed to reinsure certain risks written by NESCO, principally in the areas of umbrella liability and excess liability. Allstate Insurance Company was also a party to at least 2 of the 41 treaties, as a ceding insurer. In addition to this treaty business, NESCO and MIC entered into a number of facultative certificates, under which a single risk written by NESCO was reinsured in part by MIC.

3. While at least some of the facultative certificates entered into between NESCO and the Mission Group did not contain arbitration provisions, each of the reinsurance treaties between these companies which is in Allstate's possession contains such a clause, providing that any disputes arising under the treaty shall be submitted to binding, non-judicial arbitration. Under Allstate's normal procedures, such a provision would be included in all of the treaties. A true and correct copy of a sample reinsurance treaty between NESCO and MIC is attached hereto as Exhibit A. Many of the arbitration agreements in the NESCO-Mission treaties are identical to the provision set forth at pages 7-8 of the treaty attached as Exhibit A hereto, though other arbitration provisions vary in certain respects. Attached hereto as Exhibit B are true and correct copies of exemplars of each of the arbitration clauses contained in the reinsurance treaties between NESCO and MIC that are in Allstate's possession.

4. As of March 1987, Allstate calculated that a balance of roughly \$13 million was due Allstate on the business reinsured by MIC, including outstanding reserves and reserves for incurred but not reported claims ("IBNR"). The great majority of the sums due Allstate arise under the treaties between NESCO and the Mission Group, as

opposed to the facultative business transacted between these companies.

B. Allstate As The Mission Group's Reinsurer.

5. Beginning in 1961 and continuing through 1985, Allstate agreed to reinsure four of the Mission Group companies on whose behalf the present lawsuit has been filed: MIC, Mission National Insurance Co., Enterprise Insurance Co., and Holland-America Insurance Co. Allstate and one or more of the Mission Group companies entered into approximately 26 reinsurance treaties under which classes of business written by the Mission Group were reinsured in part by Allstate. The agreements also include several thousand facultative certificates under which a single risk written by a Mission Group company was reinsured in part by Allstate. Finally, these agreements include a number of "retrocession" agreements by which a Mission Group company assumed a portion of reinsurance provided by Allstate to other primary companies. As of March 1987, Allstate calculated that the total net balance due the Mission Group under these agreements was roughly \$7 million, including outstanding reserves and reserves for IBNR.

6. Each of these reinsurance treaties that Allstate has been able to locate (more than 35 in number) contain an arbitration provision. Under Allstate's normal procedures, such a provision would be included in all such agreements. A true and correct copy of a representative treaty pursuant to which Allstate reinsured Mission is attached hereto as Exhibit C. Attached hereto as Exhibit D are true and correct copies of exemplars of each of the other arbitration clauses contained in the reinsurance treaties described in the preceding paragraph that Allstate has been able to locate. As with the NESCO-MIC treaties, the arbitration provisions attached as Exhibits C and D are largely but not completely identical to one another.

7. To the best of my knowledge and belief, each of the facultative certificates between Allstate and the Mission Group, with the exception of a few very early certificates, also contained an arbitration provision. Attached hereto as Exhibit E is a representative sample of such an arbitration provision. Under Allstate's normal procedures, such provisions would have been included in all of the certificates pursuant to which Allstate agreed to reinsure the Mission Group, excepting only the very early certificates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of September, 1990 at South Barrington, Illinois.

/s/ David S. Brodnan
DAVID S. BRODNAN

EXHIBIT A

CASUALTY QUOTA SHARE AGREEMENT

between

NORTHBROOK INSURANCE COMPANY
Northbrook, Illinois

(hereinafter called "Company")

and the

COMPANIES SPECIFIED IN THE
INTERESTS AND LIABILITIES
AGREEMENTS ATTACHED HERETO

(hereinafter called "Reinsurer")

ARTICLE I

BUSINESS COVERED

The Company shall issue policies, contracts, binders, slips, and/or other evidence of insurance or reinsurance (hereinafter referred to as "policies") covering Umbrella Liability and/or Excess General Liability Business; and the Reinsurer agrees to reinsure such policies of the Company in accordance with the following terms and conditions.

ARTICLE II

TERRITORY

This Agreement shall apply wherever the Company's policies apply.

ARTICLE III

RETENTION AND LIMIT

The Company agrees to cede and the Reinsurer agrees to accept under the Agreement a sixty-five per cent (65%) pro rata proportion of each of the Company's

policies as defined in Article I. The Company will keep a thirty-five per cent (35%) pro rata proportion of each of the policies for its own account.

As respects policies reinsured under this Agreement, it is understood and agreed that:

- 1.) The maximum limits subject to this Agreement shall be deemed not to exceed:
 - a) \$5,000,000 each occurrence;
 - b) \$5,000,000 in the aggregate, each annual period as respects Products Liability;
 - c) \$5,000,000 in the aggregate, each annual period as respects Occupational Disease.
- 2.) All policies written shall be excess of:
 - a) At least \$100,000 each person, \$300,000 each occurrence for Automobile Bodily Injury exposure and \$300,000 each person, \$300,000 each occurrence for General Liability Bodily Injury exposure;
 - b) At least \$100,000 each occurrence, and in the aggregate annually, for Property Damage exposures;
 - c) At least \$10,000 for self-insured perils;
 - d) Underlying limits specified in the policies for all other perils.
- 3.) In the event of the original umbrella limit being less than \$5,000,000 the Company will determine that higher limits will not be purchased in any other market unless the Company's quotation to the original Insured is unacceptable.
- 4.) Coverage may be extended under umbrellas to include Specific Workmen's Excess Compensation, but only excess of \$100,000.

- 5.) No individual policy shall be written for a period greater than thirty-six (36) months plus odd time, which in no event shall exceed forty-two (42) months in all, unless otherwise mutually agreed.
- 6.) Policies shall be issued using the equivalent of the "LONDON 1971" or "LRD May 60" forms, or other forms as may be mutually agreed, but including defense and/or self-insured perils.
- 7.) Each individual policy shall contain the appropriate Nuclear Incident Exclusion Clause and Radioactive Contamination Exclusion Clause, the equivalent of N.M.A. 1477.

ARTICLE IV

EXCLUSIONS

This Agreement shall not apply to, but specifically excludes policies issued in respect of:

- 1.) Railroads.
- 2.) Contractors involved in tunneling under pressure, blasting on construction of dams or bridges.
- 3.) Governmental bodies where coverage is required for airport operations, or utilities, other than waterworks.
- 4.) Pharmaceutical manufacturers and/or distributors.
- 5.) Utilities other than wholesalers.
- 6.) Oil Risks other than well owners, lease operators, well services, and oil and/or gas well drilling contractors, unless specifically accepted by the Reinsurer.
- 7.) Chemical manufacturing.
- 8.) All errors and omissions liability or malpractice except hospital malpractice with minimum underlying limits of \$200/600.

- 9.) Aviation risks.
- 10.) Manufacture of aircraft products.
- 11.) Directors and officers liability.
- 12.) Kidnap and ransom.
- 13.) S.E.C. liability.
- 14.) Fidelity and surety.
- 15.) Business written and classified as ocean marine.
- 16.) Business emanating from the R.L. Jarrett Agency.
- 17.) Credit life insurance.
- 18.) Insolvency and Financial guarantee.
- 19.) Assumed reinsurance.
- 20.) Risks of war, bombardment, invasion, insurrection, rebellion, revolution, military or usurped power or confiscation by order of any government or public authority, as excluded under a standard policy containing a standard war exclusion clause.

If the insured's main operations are not excluded hereunder, exclusions 1 through 8 shall not apply provided such operations or perils are incidental to the insured's main operations. The Company shall be the sole judge of the meaning of the word "incidental".

ARTICLE V

ORIGINAL CONDITIONS

All reinsurances for which the Reinsurer shall be liable by virtue of this Agreement shall be subject in all respects to the same terms, rates, conditions, interpretations, and waivers and to the same modifications, alterations and cancellations as the respective policies, binders, contracts or agreements of the Company to which such reinsurance relate, it being the intention of this Agreement that the Reinsurer is to follow the fortunes of the Company.

ARTICLE VI

TERM AND CANCELLATION

This Agreement shall be effective at 12:01 a.m. September 1, 1974 and shall apply to risks bound by the Company with inception or renewal dates occurring subsequent to 12:01 a.m. September 1, 1974.

Further, this Agreement shall remain in effect for an indefinite period, but may be terminated by either party giving at least thirty (30) days previous notice by registered letter, such cancellation to become effective at any September 1. The Reinsurers shall participate in all policies coming within the terms of this Agreement having an effective or renewal date during the thirty (30) days aforesaid and shall remain liable until the natural expiration of these policies and all other policies attaching during the period of the Agreement for their share of losses arising out of all policies in force at the expiration of the said thirty (30) days notice, but not to exceed one year, unless otherwise agreed upon. At the end of the one year, or mutually agreed upon period, the unearned premiums, if any, less commission is to be returned to the Company by the Reinsurer.

Except as otherwise provided herein this Agreement shall be ipso facto cancelled in the event of insolvency, liquidation or change of majority financial control of either party, except that the surviving party reserves the right to waive such cancellations after it has been fully informed as to the circumstances of such insolvency, liquidation or change of majority financial control. If such surviving party then elects to waive the cancellation, this Agreement shall be reinstated by written notice, of the same to the other party, stating when such reinstatement is effective. Notwithstanding the foregoing, the Reinsurers shall participate in all policies coming within the terms of this Agreement at the time of such cancellation and shall remain liable until the natural expiration of all

policies attaching during the period of this Agreement, but not exceeding one year, unless otherwise agreed upon.

ARTICLE VII

DEFINITION OF OCCURRENCE

The term "occurrence" shall mean any one occurrence, or series of occurrences arising out of one event and/or caused by accumulative or continuous operations at one specific site which cannot be attributed to any single event, and/or proceeding from the use or consumption of one prepared or acquired lot of merchandise or product, or as defined in the original insurance.

The term "aggregate" shall mean ultimate net loss incurred in the aggregate during any one policy year.

ARTICLE VIII

LOSSES

All loss settlements made by the Company provided same are within the conditions of the original policies and within the terms of this Agreement, shall be unconditionally binding upon the Reinsurers.

Reinsurers shall be liable for their proportionate share of all expenses incurred by the Company in connection with the investigation and settlement of losses or alleged losses (but excluding salaries of employees or of officials of the Company and also excluding any allowances for internal office expenses) and shall participate pro rata to their respective interest in any sums which may be recovered by the Company, whether as salvage or otherwise.

The Company will adhere to the following Claims Procedure:

- 1.) Immediate advice shall be given by the Company of any loss likely to involve an original policy, such advice to be submitted by mail immediately with copies of all relevant information.

- 2.) If a loss is likely to involve the original policy, an attorney must be appointed depending upon the location of the loss or where the litigation is likely to take place.
- 3.) As soon as the attorney's reports are received, they are to be submitted by mail for information purposes.

The Reinsurer shall share proportionately in any salvage or any other recovery (after expenses) that may be received by the Company applicable to any loss under this Agreement.

Should the Company become legally obligated to pay a loss in excess of its policy limits, the Reinsurer agrees to assume seventy-five per cent (75%) of that part of such loss plus proportionate loss expense which is in excess of the policy limit, such loss in excess of the limit having been incurred because of failure to settle within the policy limit or by reason of alleged or actual negligence, fraud or bad faith in rejecting an offer of settlement or in the preparation of the defense, or in the trial of any action against its Insured or in the preparation or prosecution of an appeal consequent upon such action. In no event, however, shall the liability of the Reinsurer respecting any such loss exceed the limits of liability of this Agreement as set forth in Article III.

ARTICLE IX

PREMIUM

The premium payable to the Reinsurer by the Company shall be their proportionate share of the original net premiums received by the Company in respect of business covered hereunder, less ten per cent (10%).

"Original net premiums" as used in this Article shall be understood to mean original gross premiums, less acquisition costs, and less Federal Excise Tax, if applicable. It is further understood that total acquisition costs of the

Company in respect of all policies covered hereunder shall not exceed twenty-two and one-half per cent (22.5%).

ARTICLE X

ACCOUNTS AND STATISTICS

Within forty-five (45) days following the close of each month the Company shall provide a Statement of Account, which Statement shall include a premium closing bordereau with respect to each policy closed, and a bordereau of claims paid during the month, as well as a bordereau of outstanding claims.

Payment of the balance due shall be made by the debtor party within forty-five (45) days after the account has been rendered.

The Company retains the right, however, to request special settlement of any claim hereunder, and the Reinsurer shall make such payment within seven (7) days of receipt of appropriate proof of loss. Any such special settlements will not appear on the monthly "Claims Paid Bordereau".

The following paragraph not applicable where not required to avoid statutory penalty.

It is further agreed that the Reinsurer will provide letters of credit in favor of the Company for the Reinsurer's share of the outstanding losses and loss expenses issued by a U.S. Bank a member of the Federal Reserve System and such letters of credit to be adjusted quarterly.

ARTICLE XI

CURRENCY

All accounts shall be rendered and settled in U.S. Dollars.

*ARTICLE XII**ERRORS AND OMISSIONS*

It is mutually agreed that neither the Company's nor the Reinsurer's interests shall be prejudiced by inadvertent errors or omissions which may occur in the application or use of this agreement, and upon discovery of any such errors or omissions, prompt rectification shall be made.

*ARTICLE XIII**TAXES*

In consideration of the terms under which this Agreement is issued, the Company agrees not to claim any deduction in respect of the premium hereon when making tax returns, other than income or profits tax returns, to any State or Territory or the District of Columbia.

ARTICLE XIV

FEDERAL EXCISE TAX (applicable to certain Reinsurers not domiciled in the United States of America)

Notice is hereby given that the Reinsurer has agreed to allow for the purpose of paying Federal Excise Tax one per cent (1%) of the premium payable hereon to the extent such premium is subject to Federal Excise Tax.

It is understood and agreed that in the event of any return of premium becoming due hereunder the Reinsurer will deduct one per cent (1%) from the amount of the return and the Company shall take steps to recover the Tax from the United States Government.

*ARTICLE XV**ARBITRATION*

In the event of differences arising between the contracting parties with reference to any transactions under this Agreement, such differences must be submitted to arbitration upon the request of one of the contracting parties.

Each of the contracting parties shall nominate an arbitrator within thirty (30) days of being requested to do so, and the two named shall select an umpire before entering upon the arbitration. In the event that either party fails to appoint its arbitrator within the time specified, the other party shall have the right to appoint the said arbitrator forthwith. The said arbitrators and umpire shall be executive officers of insurance or reinsurance companies or insurance brokers or an attorney specializing in insurance law, not under the control or management of either party to this Agreement.

If the arbitrators do not agree as to an umpire within thirty (30) days of their appointment, each of them shall name three, of whom the other shall decline two, and the decision shall be made by drawing lots. Each party shall submit its case to its arbitrator within fifteen (15) days of the appointment of the umpire or within such period as may be agreed by the Board of Arbitration.

A decision in writing of any two of the three (two arbitrators and one umpire), when filed with the contracting parties, shall be binding upon both. The arbitrators and the umpire are relieved from all judicial formalities and may abstain from the strict rules of law, interpreting the present Agreement as an honorable engagement rather than a merely legal obligation.

Each party shall pay the fee of its own arbitrator and half of the fee of the umpire, and the remaining costs of the arbitration shall be paid as the award shall direct.

Any arbitration shall take place in Northbrook, Illinois unless otherwise agreed.

*ARTICLE XVI**INSOLVENCY*

In the event of the insolvency of the Company, this reinsurance shall be payable directly to the Company, or to its liquidator, receiver, conservator or statutory suc-

cessor on the basis of the liability of the Company without diminution because of the insolvency of the Company or because the liquidator, receiver, conservator or statutory successor of the Company has failed to pay all or a portion of any claim.

It is agreed, however, that the liquidator, receiver, conservator or statutory successor of the Company shall give written notice to the Reinsurers of the pendency of a claim against the Company indicating the policy or bond reinsured which claim would involve a possible liability on the part of the Reinsurers within a reasonable time after such claim is filed in the conservation or liquidation proceeding or in the receivership, and that during the pendency of such claim, the Reinsurers may investigate such claim and interpose, at their own expense, in the proceeding where such claim is to be adjudicated any defense or defenses that they may deem available to the Company or its liquidator, receiver, conservator or statutory successor. The expense thus incurred by the Reinsurers shall be chargeable, subject to the approval of the court, against the Company as part of the expense of conservation or liquidation to the extent of a pro rata share of the benefit which may accrue to the Company solely as a result of the defense undertaken by the Reinsurers.

ARTICLE XVII

ACCESS TO RECORDS

The Reinsurers or their duly authorized representatives may examine at all reasonable times at the office of the Company the books, records and papers pertaining to the risks reinsured hereunder; but it is understood and agreed that the business of the Company in which the Reinsurers have a reinsurance interest hereunder is the sole and absolute property of the Company and the Reinsurers agree not to use any information so acquired for any purpose other than that as contemplated herein.

[Exhibits B, C, D and E Omitted in Printing]

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

SUPPLEMENTAL NOTICE OF REMOVAL OF CIVIL ACTION AND STATEMENT OF ADDITIONAL GROUNDS FOR REMOVAL AND JURISDICTION

TO THE PARTIES HERETO AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Allstate Insurance Company ("Allstate") and Defendant Insurance Company of North America ("INA") hereby file this Supplemental Notice of Removal of Civil Action and Statement of Additional Grounds for Removal and Jurisdiction, specifying grounds for the removal of this action and for this Court's exercise of jurisdiction over this action, in addition to the grounds stated in Allstate's Notice of Removal of Civil Action filed herein on August 31, 1990. These additional grounds for removal are as follows:

1. Allstate and INA are named as defendants in a civil action filed in the Superior Court for the State of California for the County of Los Angeles, Case No. C 751868, entitled *Roxani Gillespie, Insurance Commissioner of the State of California, in her capacity as liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Mission Reinsurance Corporation, Holland-America Insurance Company vs. Allstate Insurance Company; AGF Reinsurance Corp.; American Union Insurance Co. of New York; Atlas Assurance Company of America; Employers Mutual*

Liability Insurance Corp.; Harbor Insurance Co.; INA Reinsurance Company; Insurance Company of North America; Lincoln National Reinsurance Co.; New England Reinsurance Corp.; North American Co. for Property and Casualty; Northwestern National Insurance Co.; Phoenix Assurance Company of New York; R.L.I. Insurance; Security Mutual Casualty Co.; Transatlantic Reinsurance Co.; Trinity Universal Insurance Co.; U.S. Fidelity & Guaranty Co.; Victory Reinsurance Co. of America; Zenith Insurance Company; and Does 1 thru 1000, inclusive, which action was timely removed to this Court by Allstate pursuant to 28 U.S.C. § 1441(c) on August 31, 1990.

2. At the time Allstate initially removed this action, there was not complete diversity between the parties. Subsequently, on or about January 25, 1991, plaintiff Insurance Commissioner of the State of California filed in the Superior Court of the State of California for the County of Los Angeles the Request for Dismissal attached hereto as Exhibit A, indicating an intent to dismiss the defendants specified therein ("the Dismissed Defendants"). The Dismissed Defendants include all defendants that are not of citizenship diverse from that of the plaintiff Insurance Commissioner. On February 8, 1991, Allstate and INA filed with this Court the Notice of and Stipulation to Plaintiff's Dismissal of Certain Named Defendants, a true and correct copy of which is attached hereto as Exhibit B, effecting the dismissal of the Dismissed Defendants from this action.

3. As a consequence of the dismissal of the Dismissed Defendants, there is complete diversity between plaintiff, a citizen of the State of California, and the remaining defendants, Allstate, INA, Employers Insurance of Wausau a Mutual Company (sued herein under its former name, Employers Mutual Liability Corp.), Transatlantic Reinsurance Co., and Victory Reinsurance Company of America (collectively "the Remaining Defendants") because, at the time of commencement of this action and at all

times thereafter, Allstate Insurance Company was and is a corporation incorporated under the laws of the State of Illinois, with its principal place of business in Illinois; defendant INA was and is a corporation incorporated under the laws of the Commonwealth of Pennsylvania with its principal place of business in Pennsylvania; defendant Employers Insurance of Wausau a Mutual Company (sued herein under its former name, Employers Mutual Liability Corp.) was and is a corporation incorporated under the laws of the State of Wisconsin with its principal place of business in Wisconsin; defendant Transatlantic Reinsurance Co. was and is a corporation incorporated under the laws of the State of New York with its principal place of business in New York; and defendant Victory Reinsurance Company of America was and is a corporation incorporated under the laws of the State of Delaware with its principal place of business in Delaware.

4. Although fictitiously-designated Defendants Does 1 through 1000 are referred to in the Complaint, such fictitiously-designated defendants are to be disregarded for purposes of diversity pursuant to 28 U.S.C. § 1441(c).

5. The matter in controversy herein exceeds the sum of \$50,000, exclusive of interest and costs, as to each Remaining Defendant. For this reason and those alleged hereinabove, and in addition to the grounds for jurisdiction and removal specified in Allstate's August 31, 1990 Notice of Removal, this action is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1332 (a)(2), and which Allstate and INA are and would be entitled to remove under 28 U.S.C. § 1441(a).

6. In the alternative, and in addition to the grounds specified in Allstate's August 31, 1990 Notice of Removal, this action is a civil action of which this Court has original jurisdiction under 28 U.S.C. § 1332(a)(2), and which Allstate and INA are and would be entitled to remove under 28 U.S.C. § 1441(a), in that each originally-named defendant herein that is not of citizenship

diverse from plaintiff (insofar as any such non-diverse defendant remains a party as of the date of filing this Supplemental Notice) is a sham and merely nominal defendant who should be disregarded in determining whether there is complete diversity for jurisdictional and removal purposes, and in that the matter in controversy herein exceeds the sum of \$50,000, exclusive of interest and costs, as to each defendant that should not be so disregarded.

7. Allstate and INA file and serve this Supplemental Notice within one year of the filing of the above-referenced Superior Court action and within 30 days of Allstate's receipt and of INA's receipt of the pleadings from which it could first be ascertained that the case is one that would be removable on the grounds specified herein. This Supplemental Notice is therefore timely.

8. Allstate and INA are informed and believe and on that basis allege that the other Remaining Defendants (Employers Insurance Company of Wausau a Mutual Company, Transatlantic Reinsurance Co., and Victory Reinsurance Co.) have not been served with or received a copy of the Commissioner's complaint herein and have not appeared in this action. Allstate and INA accordingly submit that such defendants need not join in this Supplemental Notice of Removal. *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1429-30 (9th Cir. 1984).

9. Allstate's August 31, 1991 Notice of Removal attached all process, pleadings, and orders properly served upon Allstate and INA in the above-referenced Superior Court action.

WHEREFORE, Allstate and INA hereby specify the facts recited above as additional grounds for the removal of the above-referenced Superior Court action to this United States District Court and for this Court's exercise of jurisdiction over this action.

DATED: February 8, 1991

MUNGER, TOLLES & OLSON
MELVYN H. WALD
JOSEPH D. LEE

By /s/ Joseph D. Lee
JOSEPH D. LEE

Attorneys for Defendant
ALLSTATE INSURANCE COMPANY

DATED: February 8, 1991

MAYER, BROWN & PLATT
NEIL M. SOLTMAN
ROBERT L. WALDMAN

By /s/ Robert L. Waldman
ROBERT L. WALDMAN

Attorneys for Defendant
INSURANCE COMPANY OF
NORTH AMERICA

[Exhibits A and B Omitted in Printing]

[Proof of Service omitted in printing]

No. 91-55855

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, MISSION REINSURANCE CORPORATION TRUST and HOLLAND-AMERICA INSURANCE COMPANY TRUST,

Plaintiff-Appellee,

v.

ALLSTATE INSURANCE COMPANY, *et al.*,
Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

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I. INTRODUCTION AND STATEMENT
OF COUNSEL

The Insurance Commissioner of the State of California, in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, Enterprise Insurance Company Trust, Holland-America Insurance Company Trust and Mission Reinsurance Company Trust (the "Mission Companies") (the "Commissioner"), Appellee in *Insurance Commissioner, et al. v. Allstate Insurance Company, et al.*, No. 91-55855, seeks rehearing *en banc* of the February 2, 1995 Panel Decision (the "Decision") (Fletcher, J., Pregerson, J., and Norris, J.) (the "Panel"). On July 3, 1991, the U.S. District Court for the Central District of the State of California (the "district court") entered is Order granting the Commissioner's Motion to Remand. Allstate appealed that Order. The Panel held that (1) review of the remand order in this case is not barred by 28 U.S.C. Section 1447(d); (2) the remand order based on abstention was a final collateral order that was reviewable on appeal; and (3) a district court may not abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) ("*Burford*") when the plaintiff seeks only legal relief.

The Commissioner seeks rehearing *en banc* of the issues numbered 2 and 3 identified above. In the judgment of counsel, rehearing *en banc* is required because the Panel's Decision overlooks the fact that this is an equitable action involving equitable proceedings with a counterclaim brought in equity, and directly conflicts with decisions of the Federal Circuit Courts relied upon in the Decision, as well as decisions of the United States Supreme Court on issues of exceptional importance. The Panel's Decision, if allowed to stand, will interfere with substantial state interests in the regulation of insurance insolvency and circumvent the orderly liquidation of the Mission Companies. Furthermore, the portion of the Panel's Decision which holds that the *Burford* abstention based remand order is

a directly appealable final collateral order, conflicts with the decision of this Court in *Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992).

II. PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

A. The Decision Erred as it Overlooks the Fact that this Action is Equitable in Nature.

This Court's Decision is based entirely upon the premise that the underlying suit is an action exclusively at law. Since this premise is incorrect, it follows that the Decision is incorrect.

1. The Complaint Seeks the Equitable Remedy of Declaratory Relief.

The First Cause of Action alleged in the underlying complaint¹ is an action for declaratory relief. California courts have recognized that "[a]n action for declaratory relief is equitable in nature." *Munson v. Linnick*, 255 Cal. App.2d 589, 63 Cal. Rptr. 340, 343 (1967). The California Court of Appeal has held that a plaintiff may seek "equitable relief by way of declaratory judgment" and that equity will grant complete relief in a declaratory action. *Bertero v. National General Corp.*, 254 Cal. App. 2d 126, 62 Cal. Rptr. 714, 720, 726 (1967). *See also*, *Postley v. Harvey*, 153 Cal. App.3d 280, 200 Cal. Rptr. 354, 357-58 (1984), quoting *E.L. White, Inc. v. City of Huntington Beach*, 21 Cal.3d 497, 507, 146 Cal. Rptr. 614, 579 P.2d 505 (1978). Accordingly, under California law, a state action for declaratory relief is not an action in which plaintiff seeks only legal relief. Since the Commissioner's First Cause of Action in the underlying Complaint is one for declaratory relief, his suit includes an action which involves equitable relief.

¹ See Addendum, Ex. 1, pp. 1-32; Court Docket Sheet, Appellant's Excerpts of Record, Ex. 5, p. 90, item 1.

Federal courts have also recognized the equitable nature of declaratory judgment actions: "[t]he propriety of issuing a declaratory judgment may depend upon equitable considerations and should be 'informed by the teachings and experience concerning the functions and extent of federal judicial power.'" *Church of Scientology Int'l v. Kolts*, 846 F. Supp. 873, 883 (C.D.Cal. 1994), quoting *Green v. Mansour*, 474 U.S. 64, 72 (1985). The United States Supreme Court has stated that "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (emphasis added), quoting *Eccles v. Peoples Bank*, 333 U.S. 426, 431 (1948); *see also* *Sierra Club v. Yeutter*, 911 F.2d 1405, 1420, n.8 (10th Cir. 1990). "The judicial discretion which inheres in the declaratory judgment context should be exercised . . . in an 'equity-like' suit, in accordance with traditional equity principles." *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 493 (1st Cir. 1992); *see also* *First Fed. Sav. & Loan Ass'n v. Greenwald*, 591 F.2d 417, 424 (1st Cir. 1979). Additionally, federal courts "balance" several equitable factors in determining whether declaratory relief should be granted. *L. Perrigo Co. v. Warner-Lambert Co.*, 810 F. Supp. 897, 898-99 (W.D.Mich. 1992).^{2,3}

² These factors include whether the declaration would settle the controversy, would "serve a useful purpose in clarifying the legal relations in issue," is being used for "procedural fencing," or would increase friction between federal and state courts, or whether there is a more effective alternative remedy.

³ While some federal courts have held that declaratory judgment actions, as creatures of statute, are inherently neither legal nor equitable, courts do ascertain whether the suit is grounded in law or equity by looking to the basic nature of the case and how the issues would have arisen in the absence of the Declaratory Judgment Act. *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 493 (1st Cir. 1992) ("without serious question, . . . this suit is equitable in nature, and therefore, governed by traditional principles of

Even apart from the First Cause of Action, the remaining causes of action in the underlying suit involve a massive effort by the Commissioner to marshal the billions of dollars of assets of the Mission Companies and to adjust billions of dollars in claims against those companies. The underlying litigation between Allstate and the Commissioner is thus more than a mere collection action at law. A declaration of the rights and interests of the parties under the reinsurance agreements serves, not only to permit the determination of a bundle of rights and duties between Allstate and the Mission Companies, but also furthers the rights and interests of innocent policyholders of the Mission Companies in the underlying state court insolvency proceedings, which, like bankruptcy proceedings, are inherently equitable in nature. *Kinder v. Superior Court*, 78 Cal. App.3d 574, 144 Cal. Rptr. 291, 296 (1978); see also *Morgan Stanley Mortgage Capital, Inc. v. Insurance Commissioner*, 18 F.3d 790, 794 (9th Cir. 1994); *Garamendi v. Executive Life Ins. Co.*, 17 Cal. App.4th 504, 21 Cal. Rptr.2d 578 (1993). Moreover, Allstate's admitted primary defense of set off is, in and of itself, a form of equitable relief and would be determined as a part of the declaratory relief action. *Prudential Reinsurance v. Superior Court*, 3 Cal. 4th 1118, 14 Cal. Rptr. 201 749, 842 P.2d 48 (1992). Thus, the major issues to be determined will be determined by the action for declaratory relief and involve issues of equity, as opposed to merely issues of law.

Since the single premise upon which the February 2, 1995 decision is based is in error, the Decision should be reconsidered, and this Court should approve the decision of the district court in abstaining and remanding the underlying action.

equity jurisprudence"); *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1523 (11th Cir. 1987).

2. The Decision Substantially Interferes With a Comprehensive State Statutory Scheme.

Because of the insolvency of the Mission Companies, the rights and duties of the parties are governed by the comprehensive state statutory scheme contained in California Insurance Code Sections 1010, *et seq.* The declaratory relief cause of action in the underlying complaint seeks not only equitable relief, but also requires an interpretation of the rights and duties of the parties under the state's statutory scheme for liquidating insolvent insurers. The state statutory scheme and the proceedings held under it are also fundamentally equitable proceedings. *Kinder, Morgan Stanley, Garamendi, supra.*

Rehearing is required because the Decision threatens the entire liquidation process. This is demonstrated by a recent effort by Allstate to interfere with the liquidation proceedings based entirely upon the Decision.

Allstate now claims that because this Court decided that abstention based upon *Burford* is inappropriate, all of its claims against the Mission Companies, including claims asserted in the proofs of claim filed in the state court by Allstate, as mandated by the state statutes, must now be resolved in federal court, together with this litigation. These claims include the claims for set off. Please see Addendum, Ex. 2, pp. 33-34; and Ex. 4 and 5, pp. 50-58. Such a result would disregard the claims provisions of California Insurance Code Sections 1023 through 1035, among others, and would convert the statutory scheme from a state proceeding to one which would occur in federal court under an unknown set of rules. This would clearly interfere with the State's interest in an orderly liquidation process, particularly the adjudication of all claims against the assets of the insolvent estates in one forum. This task has been handled by the Mission Liquidation Court for nearly ten years, as that court has long assumed sole and exclusive jurisdiction to adjudicate

claims against the assets of the Mission Companies.⁴ Thus, with the ink hardly dry on the Decision, it is being used directly to interfere with California's comprehensive statutory scheme. This is precisely the outcome cautioned against by the Commissioner and expressly prohibited by numerous courts throughout the country. Appellee's Answering Brief, pp. 8-10.

Allstate has even gone so far as to state that the Final Liquidation Dividend Plan, which was filed on December 28, 1994 and which contemplates a procedure for amending contingent, undetermined and/or unliquidated claims against the Mission estates to make them certain, a final liquidation dividend to be paid to claimants (a distribution of the estates' assets), and the ultimate closure of the estates, may not be pursued under the state statutes, but must proceed in federal court. This cannot be what this Court intended, nor is such an outcome countenanced by *New Orleans Public Service, Inc. v. Council of City Of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506 (1989) ("NOPSI")⁵ or other cases deciding whether to apply *Burford* abstention in insurance insolvency cases.⁶

⁴ The Orders Appointing Conservator (October 31, 1985 and November 26, 1985), see Appellee's Excerpts of Record, Exs. 1-5, and Liquidator (February 24, 1987), *Id.*, Exs. 7-10, the Supplemental Order Appointing Liquidator and Restraining Order (March 5, 1987), *Id.*, Ex. 11, the Final Order of Rehabilitation (April 25, 1990), *Id.*, Ex. 12, and the Order Approving Final Liquidation Dividend Plan (December 28, 1994), Addendum, Ex. 3, pp. 35-49, all reiterate the Mission Liquidation Court's assumption of sole and exclusive jurisdiction to determine all claims against the assets of the Mission Companies' estates. These orders are all final and have not been challenged at any level. Allstate may not now complain about provisions of orders of which it had notice and failed to seek review. *Allstate Insurance Company v. Christopher John Hughes, et al.*, 174 B.R. 884 (1994).

⁵ A full discussion of the Court's misapplication of NOPSI is addressed in Section II, *infra*.

⁶ Insurance Code Sections 1011 and 1058.

Allstate's proofs of claim in the Mission liquidation proceedings and the Commissioner's causes of action against Allstate will involve, among other things, a declaratory judgment as to claimed rights to set off by Allstate. The right to set off is historically an equitable action brought in chancery. *Prudential*, 14 Cal. Rptr. 2d at 751. The California Supreme Court has determined when set off is permissible under insolvency proceedings. *Prudential, supra*. The *Prudential* decision was based upon an interpretation of the provisions of the state insolvency statutes and California law. There is no doubt that certain kinds of set offs are permissible and some are not. The application of these rules is a matter of substantial state interest and the subject of significant controversy and litigation by numerous claimants and defendants throughout the liquidation proceedings.⁷

The purpose of the insurance insolvency statutes is to ensure uniform application of those laws to insolvent estates. *LacD'Amiante du Quebec v. American Home Assur. Co.*, 864 F.2d 1033, 1045 (3d Cir. 1988); *Blackhawk Heating & Plumbing Co. v. Geeslin*, 530 F.2d 154, 159-160 (7th Cir. 1976); *Todd v. Richmond*, 853 F. Supp. 1309, 1314-15 (D.Kan. 1994). One of these goals is the consistent application of statutes and local rules to the determination of the validity of claims against the estates. *Todd*, 853 F. Supp., 1314-1315. To permit entities such as Allstate, who have voluntarily submitted proofs of claim in the pending and ongoing insolvency proceedings, to now remove the issues involved in the approval or disapproval of those claims to a federal court, will certainly disrupt the state proceedings. Further, if Allstate is permitted to do so, then so may others. The end result would be a multitude of litigation with a number of federal courts administering the claims procedures for the State of California, instead of the claims being

⁷ See *Prudential, supra*; Ruling On Submitted Matter and Order Enforcing Reinsurance Commutation and Settlement Agreement with Imperial Casualty and Indemnity Co., Addendum, Ex. 6.

adjudicated in accordance with the state's statutory scheme. The likelihood of inconsistent rulings and the waste of estate and judicial assets is obvious.

Preventing the federal court from exercising its discretion to abstain frustrates the State's goal of establishing a uniform application of the laws governing insurance insolvency. Therefore, rehearing should be granted to correct the failure of the Court to recognize the fundamental equitable nature of the proceedings, including the equitable defense of set off.

B. Insurance Insolvency Proceedings Are Special Proceedings From Which Federal Courts Routinely Abstain Under *Burford*.

Insurance insolvency proceedings are special proceedings with very complex and interlocking considerations which cry out for *one* court to exercise jurisdiction over them. *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal. 2d 307, 74 P.2d 761, 773 (1937), *aff'd*, *Neblett v. Carpenter*, 305 U.S. 297 (1938).

Burford abstention is routinely exercised in insurance insolvency cases. A review of the case law involving *Burford* abstention throughout the federal courts reveals that courts regularly uphold *Burford* abstention in similar insurance insolvency cases.

In *Corcoran v. Ardra Insurance Company, Ltd.*, 842 F.2d 31 (2nd Cir. 1988), the Second Circuit confronted an almost identical situation. The district court abstained from exercising jurisdiction over a matter that arose out of an Insurance Commissioner's efforts to collect the reinsurance proceeds of an insolvent insurer. In *Ardra*, the Second Circuit held that the district court had not abused its discretion in either abstaining or in remanding the action to state court. In *Barnhardt v. Marine Ins. v. New England Intern. Sur.*, 961 F.2d 529 (5th Cir. 1992), the Fifth Circuit similarly upheld abstention involving an insurance insolvency. That case involved an action brought

by an insurance agent for breach of contract and unjust enrichment, (causes of action at law), against an insolvent insurer for unearned premiums on a contract which had been canceled by the Commissioner in the liquidation order. *See also Martin Insurance Agency Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249 (5th Cir. 1990).

In *Hartford Casualty Insurance Co. v. Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990), the Seventh Circuit upheld the district court's decision to abstain under *Burford* because a federal court judgment would "upset the rehabilitation proceedings," *Id.* at 420, and "invade the province of the state rehabilitation court." *Id.* at 427. In *Hartford*, creditors brought claims against the parent and other subsidiaries of an insolvent insurer. In applying *Burford*, the Seventh Circuit determined that the federal litigation would overlap and disrupt the state court proceedings. *Id.* at 425-26. In *Grimes v. Crown Life Insurance Company*, 857 F.2d 699, 707 (10th Cir. 1988), cert. denied, 489 U.S. 1096 (1989), the Tenth Circuit reviewed a district court's rulings in favor of reinsurer defendants in an action brought by the Oklahoma Insurance Commissioner to obtain a declaration that would affect his ability to collect on the reinsurance contracts of an insurance company in liquidation. Like the instant case, the Commissioner had sought such a declaration in state court, but the reinsurer defendants removed the action to federal court. The Tenth Circuit held that, in light of the traditional federal deference to state receivership proceedings and the "complex and comprehensive procedures adopted for the liquidation of insolvent insurers," the district court should have abstained from exercising jurisdiction. *Id.* at 703-04.

- C. The Panel's Decision Overlooks the Fact That Other Circuits and the Supreme Court Do Not Agree, Post-NOPSI That *Burford* Abstention Applies Only in Equitable Cases.

Even if the underlying cause of action were purely legal, the Decision is incorrect in holding that *Burford* abstention may not be granted in a case seeking only legal remedies. The Panel's Decision failed to give credence to the decisions in other federal circuits which hold that *Burford* abstention is not limited by the NOPSI dicta.

The Decision rests almost entirely upon the Panel's view of the U.S. Supreme Court's decision in NOPSI. The Supreme Court did not *hold* that *Burford* does not apply in actions at law nor was the Court postured to address that question. See, *Peat Marwick*, 923 F.2d at 278 (Mansmann, J., concurring). Indeed, several Supreme Court cases decided after NOPSI, directly conflict with an application of such a rule.

The Decision itself acknowledges Supreme Court cases decided before NOPSI which indicate that *Burford* abstention is not limited to cases where federal courts are "sitting in equity,"⁸ but fails to follow these cases. It seems inappropriate to recognize the precedential weight of these cases and then to disregard them in favor of NOPSI's unclear dicta and a dissenting opinion. In *Ankenbrandt v. Richards*, 112 S.Ct. 2206 (1992), plaintiff brought tort actions in a domestic relations case. While the Supreme Court found *Burford* abstention was inappropriate because there were no state court proceedings, it suggested that *Burford* abstention principles might be applicable in certain circumstances involving elements of the domestic relationship where a federal action was brought that would depend on the status of the parties which had not been determined in state proceedings. The Supreme Court had the opportunity to reach the result

⁸ Opinion, at 1430, and fn. 10, 11.

reached by this Court's Decision, but significantly did not and left the door open for *Burford* abstention in actions at law. In *Tafflin v. Levitt*, 493 U.S. 455 (1990), the Supreme Court affirmed a Fourth Circuit decision which upheld *Burford* abstention in a RICO action for money damages. The action of the Supreme Court in *Tafflin* is inconsistent with this Court's interpretation of NOPSI.

Moreover, the Supreme Court and authoritative commentary suggest that *Burford* abstention is not limited to cases where the underlying action is in equity. Rather, the basis of the abstention doctrine is founded upon principles of federalism and comity. See, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 35 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315, 335-36 (1943) (Douglas, J. concurring); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941); *Younger v. Harris*, 401 U.S. 37, 44 (1971). As stated in 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d S 4241 (1988):

Considerations of federalism are at the heart of abstention. These considerations are too important to be made dependent on ancient distinctions about the powers of the several courts at Westminster Hall, and the ability of a federal court to defer to a state in a proper case ought not depend on whether the case is thought of as 'legal' or 'equitable.'

Although the Panel's Decision relies on Third, Second and First Circuit precedent, it failed to recognize that these circuits have reached contrary decisions. The recently decided Third Circuit case of *Riley v. Simmons*, — F.3d —, 1995 WL 19638 (3d Cir. Jan. 20, 1995) expressly undermines the Panel's reliance on *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 272 (3d Cir. 1991). Although the Third Circuit held that *Burford* abstention was not warranted in that case on other grounds, the court noted that it is not clear that Third Circuit decisions restricting *Burford* ab-

stention to equity have survived, nor that the reference to equity in NOPSI and *University of Maryland* is anything but dicta. *Riley*, 1995 WL 19638, at 16. The Panel also failed to reconcile *General Glass Co. v. Monsour Medical Found.*, 973 F.2d 197,202 (3rd Cir. 1992), another post-NOPSI Third Circuit decision, which refused to rule out abstention merely because the relief sought was for monetary damages.

The Panel's Decision also disregards the wealth of Second Circuit precedent requiring *Burford* abstention in insurance insolvency cases, instead reaching down to rely upon a Vermont District Court's decision in *Costel v. Fremont Indem. Co.*, 839 F. Supp. 265, 270 (D.Vt. 1993), which goes against the binding authority of the case law in the Second Circuit. *Levy v. Lewis*, 635 F.2d 960, 963 (2d Cir. 1980); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 43-44 (2d Cir. 1986), cert. denied, 481 U.S. 1017 (1987); *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31, 37 (2d Cir. 1988); *Capitol Indemnity Corp. v. Curiale*, — F. Supp. —, 1994 WL 722992 at 3-4 (S.D.N.Y. Dec. 30, 1994). Further, a recently-decided Second Circuit decision suggests that the Court's application of *Burford* abstention is not limited to cases where a federal court is sitting in equity. *Sheerbonnett, Ltd. v. American Exp. Bank Ltd.*, 17 F.3d 46 (2d Cir. 1994). This Court also failed to recognize the compelling reason to apply the Second Circuit precedent upholding *Burford* abstention in insurance insolvency cases, especially those cases arising under New York laws, because California's insurance insolvency statutes are modeled after New York's insurance insolvency laws. *Prudential*, 14 Cal. Rptr. 2d at 751, 755. The reliance on *Costle*, a case arising out of Vermont and which is contra to the overwhelming Second Circuit authority is inappropriate.⁹

⁹ *Costle* is also distinguishable from this case on several material facts which appear to have been overlooked by the Court in rendering the Decision. First, in *Costle*, there was no exclusive forum for the adjudication of claims to the insolvent company's assets under

The Court also did not adequately take into account the conflicting, post-NOPSI decisions in the First Circuit. The Court relied upon *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993), but failed to mention or address the First Circuit's earlier conflicting decision in *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991). In *Media Elements*, the First Circuit upheld abstention in an action at law in an insurance insolvency case. The plaintiff brought an action for personal injuries against an insolvent insurer, and the First Circuit found abstention appropriate where Puerto Rico's insurance insolvency laws were involved.

The Panel's Decision relies on cases decided by certain courts and then overlooks later decided cases finding *Burford* abstention appropriate. Accordingly, this matter is ripe for rehearing.

- D. The Decision Conflicts with the Ninth Circuit's Earlier Decision in *Bennett v. Liberty Nat. Fire Ins. Co.* and with Decisions of Other Circuits Which Hold That a Remand Decision Based on Abstention is Appealable Only When it Involves a Separate Collateral Disputed Issue.

The Court's Decision overlooks and conflicts with the Ninth Circuit's own decision in *Bennett v. Liberty Nat.*

either Vermont's statutes or the liquidation order. Whereas, here, Sections 1011 and 1058 in particular, and the various orders issued by the Mission Liquidation Court provide that the Superior Court of Los Angeles County is the venue for all proceedings regarding the assets of the Mission Companies. Second, in *Costle*, the court found that the McCarran Ferguson Act did not preempt the Federal Arbitration Act because it did not involve the business of insurance since the money sought to be collected in *Costle* was not being collected for distribution to policyholders. Instead, it was sought to reimburse the estate. Here, however, the reinsurance recoverable being collected will be distributed to policyholders and other creditors under the Plan. Therefore, factually and legally, the Decision fails to address material issues pointing to erroneous reliance on the decision in *Costle*.

Fire Ins. Co., 968 F.2d 969 (9th Cir. 1992).¹⁰ In *Bennett*, this Court concluded, "Because the court's arbitrability ruling removed the state court's power to order arbitration on remand, the order was immediately appealable." *Id.* at 971. The reasoning of *Bennett* suggests that the application of abstention, in and of itself, does not constitute a collateral disputed question. This Court's analysis in *Bennett* is consistent with the Second Circuit's decisions in *Karl Koch Erecting Co. v. New York Convention Center Development Corp.*, 838 F.2d 656 (2d Cir. 1988) (collateral dispute involved enforcement of a forum selection clause in a contract) and *Corcoran v. Ardra, supra* (remand order not appealable because lower court did not determine collateral disputed question on the merits such as enforceability of a forum-selection clause in a contract, *and abstention itself did not constitute the disputed collateral issue*) (emphasis added).

Here the district court's decision was based solely on abstention and did not decide any collateral issue on the merits regarding forum-selection clauses, arbitrability, or any other substantive issue. Indeed if the Decision stands, then all district court decisions that remand on grounds of abstention without determination of any substantive issue on the merits are automatically appealable, because abstention, without more, will now satisfy the element of a collateral disputed question.

Accordingly, because this Court's Decision failed to reconcile *Bennett* and its analysis of a collateral dispute, this Court should grant rehearing to correct its error in

¹⁰ The Commissioner, however, disapproves of *Bennett* to the extent that it erroneously holds that only if a court or arbitrator determines that funds belong to an insolvent estate does the money become part of the estate and until then the authority of the insolvency statute does not vest.

holding that the determination of the propriety of abstention alone satisfies the requirements of the *Cohen* collateral order doctrine.

III. CONCLUSION

For the foregoing reasons, the Commissioner respectfully request rehearing of the issues identified above, and/or rehearing *en banc*, as appropriate, for reasons set out in the statement of counsel.

Dated: February 15, 1995.

RUBINSTEIN & PERRY, P.C.

By /s/ Karl L. Rubinstein
KARL L. RUBINSTEIN
Attorneys for Appellee,
Insurance Commissioner

[Exhibit 1: Complaint in *Gillespie v. Allstate*, LASC Case No. C751868, omitted in printing]

EXHIBIT 2

MUNGER, TOLLES & OLSON
 A Law Partnership Including Professional Corporations
 355 South Grand Avenue
 Thirty-Fifth Floor
 Los Angeles, California 90071-1560
 Telephone (213) 683-9100

February 9, 1995

BY MESSENGER

Melissa S. Kooistra, Esq.
 RUBINSTEIN & PERRY
 355 South Grand Avenue, Suite 3100
 Los Angeles, California 90071

Re: *Garamendi v. Allstate Insurance Company, et al.,
 United States District Court, Central District of
 California, Case No. CV 90-4713 WMB (Gx)*

Dear Melissa:

My client, Allstate Insurance Company has sent me a copy of the "Order Approving Insurance Commissioner's Final Liquidation Dividend Plan, Establishing Final Claims Bar Date For Contingent, Unliquidated, And/Or Undetermined Claims And Related Orders And Setting Hearing Date" dated December 28, 1994 (the "December 28 Order"). The December 28 Order contains provisions regarding unliquidated or undetermined claims pending against the estate of certain Mission Group companies (collectively, "Mission") and the Commissioner's ability to recover for unliquidated and undetermined claims against Mission's reinsurers. The Order also purports to exercise sole and exclusive jurisdiction over the Mission estate.

As you know, the Commissioner's claims against Allstate on Mission's behalf, together with Allstate's defense

of setoff against those claims, are pending before the United States District Court in the above-referenced action ("the Federal Action"). All issues respecting balances owed to Mission on reinsurance assumed by Allstate, and all issue respecting Allstate's right of setoff, will be determined in the Federal Action (or, in the event Allstate's motion to compel arbitration is granted, in an arbitral forum subject to the oversight of the District Court). Although Allstate has filed claims against Mission for balances due from Mission (principally or solely as the result of reinsurance ceded or retroceded to Mission), those claims were filed solely to preserve Allstate's right of setoff. Indeed, the Commissioner has long made it clear that there will be insufficient assets to pay anything to creditors such as Allstate. If this is no longer accurate, please so advise me in writing.

For the above reasons, Allstate believes that the December 28 Order has no application to it. Although the Order purports to exercise exclusive jurisdiction over Mission's estate (December 28 Order, ¶ 2), obviously this cannot oust the federal court of jurisdiction over the Federal Action. Likewise, although the December 28 Order purports to address the Commissioner's right to recover unliquidated and undetermined claims (such as IBNR) against Mission's reinsurers (*id.*, ¶ 7), such provisions can have no application to the Federal Action, except insofar as the Superior Court may restrict the Commissioner's authorization to pursue claims on Mission's behalf.

There is some uncertainty as to the impact of the December 28 Order on unliquidated and undetermined claims by Mission and against Mission. Allstate understands that Order is meant to be reciprocal, so that the same limitations are imposed with respect to unliquidated and undetermined claims against Mission's estate (including claims of offset) and those claims by Mission against reinsurers. Allstate reserves its right to object to the December 28 Order to the extent the Commissioner con-

tends (1) the Order permits the Commissioner to recover certain unliquidated or undetermined claims (such as IBNR) that are barred insofar as such claims are brought against Mission, and (2) the Order applies to Allstate notwithstanding the fact that all claims vis-a-vis Allstate and Mission are pending in the Federal Action. If the Commissioner in fact makes such a contention, please so advise me in writing no later than 5:00 p.m. on Monday, February 13, 1995.

Sincerely,

/s/ Joseph D. Lee
JOSEPH D. LEE

JDL:rcf

EXHIBIT 3

[Filed Dec. 28, 1994]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No.: C 572 724

JOHN R. GARAMENDI, Insurance Commissioner
of the State of California,

vs. *Applicant,*

MISSION INSURANCE COMPANY,
a California corporation,

Respondent.

Consolidated with Case Numbers
C 576 324; C 576 416;
C 576 323; C 576 325; C 629709

ORDER APPROVING INSURANCE
COMMISSIONER'S FINAL LIQUIDATION
DIVIDEND PLAN, ESTABLISHING FINAL CLAIMS
BAR DATE FOR CONTINGENT, UNLIQUIDATED,
AND/OR UNDETERMINED CLAIMS AND
RELATED ORDERS AND
SETTING HEARING DATE

On December 28, 1994, John Garamendi, Insurance
Commissioner of the State of California (the "Commis-

sioner"), in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, and Enterprise Insurance Company Trust, submitted his Application to Establish a Final Liquidation Dividend Plan, to Establish a Final Claims Bar Date for Contingent, Unliquidated and/or Undetermined Claims and for Related Orders relating to Mission Insurance Company, Mission National Insurance Company, and Enterprise Insurance Company, and the Trusts created by this Court with respect to said companies (the "Mission Companies" or the "Mission Trusts"). The Court, having considered the Insurance Commissioner's Application, the circumstances of the Mission Trusts, the applicable law and the arguments of counsel, and good cause appearing therefor, finds that the Application to Establish Final Liquidation Dividend Plan, to Establish Final Claims Bar Date for Contingent, Unliquidated, and/or Undetermined Claims and for Related Orders is fair, reasonable, and necessary to the orderly liquidation of the Mission Companies and/or Mission Trusts, and that the same should forthwith be approved;

IT IS THEREFORE HEREBY FOUND, DETERMINED, ORDERED, ADJUDGED AND DECREED THAT:

1. The Application of the Insurance Commissioner to Establish Final Liquidation Dividend Plan, to Establish Final Claims Bar Date for Contingent, Unliquidated, and/or Undetermined Claims and for Related Orders is granted. A hearing is hereby set for 10:00 a.m. on the 16th day of February, 1995, in Department 4, at which time any and all persons or other legal entities desiring to object to, comment on, present evidence or comments with respect to, or in any other way deal with the Commissioner's Application or this Order must do so (the "Hearing"). Any such objections, comments, or other matters relating to the subject matter herein must be made at such hearing or the same shall be irrevocably deemed waived.

2. Any and all contingent, unliquidated, and/or undetermined claims, of any kind or nature, which were previously filed on a timely basis (by September 12, 1987), and in a proper form, must be amended as liquidated claims or otherwise converted to determined and non-contingent claims by use of and pursuant to instructions in a form to be approved by this Court prior to the Hearing. Such amended claims must be filed with the Commissioner no later than August —, 1995 (the "Final Dividend Claims Bar Date"), together with proper proofs thereof, in accordance with the provisions of California Insurance Code Section 1010, *et seq.*, including but not limited to Section 1023 of the California Insurance Code. Any contingent, unliquidated, and/or undetermined claims not so amended by the Final Dividend Claims Bar Date shall be conclusively deemed forever waived. The rights and liabilities of the Mission Companies and/or the Mission Trusts and of creditors, policyholders, shareholders and all other persons interested in the assets of the Mission Companies and/or the Mission Trusts, including the State of California, have heretofore been fixed as of February 24, 1987 and shall remain so fixed. This Court continues to assert and to maintain sole and exclusive jurisdiction, to the exclusion of all other courts or tribunals, over and to all assets of the Mission Companies and/or the Mission Trusts of whatsoever kind or nature and wherever or however owned or held. No liens, judgments, awards or claims of any kind not entered by this Court in accordance with the previous Orders of this Court, all of which Orders are hereby reaffirmed, shall be valid as against the Mission Companies and/or the Mission Trusts or any of their said assets.

3. The Commissioner shall provide Notice of this Order and the Hearing in the form and content of Exhibit A annexed hereto to all policyholders, IGAs and other creditors or entities interested in the assets of the Mission Companies and/or the Mission Trusts or in these proceedings who previously timely and properly filed contingent, un-

liquidated, and undetermined claims. This Notice shall be provided by mailing a copy of the Notice to all policyholders, IGAs and other creditors or entities interested in the assets of the Mission Companies and/or the Mission Trusts or in these proceedings who previously timely and properly filed contingent, unliquidated, and undetermined claims at their addresses as shown in the records of the Mission Companies and/or the Mission Trusts and by publication in *The Wall Street Journal* and *U.S.A. Today* for a period of at least two days and in a newspaper of general circulation, published in Los Angeles County, once a week for four consecutive weeks. The Commissioner shall provide the same notice to the various state insurance commissioners, or equivalent, and the various state insurance guaranty associations, or equivalent. The Court finds that such notice is reasonably calculated to and does provide fair, reasonable and adequate notice of these proceedings, the Application, this Order, and the Hearing.

4. Any and all claims previously barred by prior orders or procedures herein shall remain barred. Any and all claims previously timely and properly filed as contingent, unliquidated, or undetermined claims, in whole or in part, are forever barred from participation in the "Final Dividend" (as defined below) unless they are amended to be liquidated and/or determined claims upon or prior to the Final Dividend Claims Bar Date. A "Contingent," "Unliquidated" or "Undetermined Claim" within the meaning of these proceedings shall be as defined in California Insurance Code Section 1025 as any claim or demand upon which a right of action had accrued at the date of the order of liquidation herein upon which the liability has not been determined or the amount thereof liquidated. Accordingly, any previously timely and properly filed Contingent, Unliquidated and/or Undetermined Claim must be made certain, both as to liability of the Mission Companies and/or the Mission Trusts or one of them, and as to the amount of such liability no later

than the Final Dividend Claims Bar Date or such claims shall be forever barred from any participation in the Final Dividend. Any claim which is partly Contingent, Unliquidated and/or Undetermined shall be subject to these provisions as to the Contingent, Unliquidated and/or Undetermined portions of such claim. If a claim is certain as to liability, but Contingent, Undetermined, or Unliquidated as to amount, the amount may be determined by application of standard actuarial principles which calculate the present value of the claim in a reasonable manner, subject to the Commissioner's agreement based upon the opinions and actuarial studies of an independent actuarial firm retained by the Commissioner in his sole discretion.

5. Within a reasonable time after the Final Dividend Claims Bar Date, on a date determined by the Commissioner in his sole discretion, the Commissioner shall cause all such amended claims to be reviewed, evaluated and either accepted or rejected; any such claim which is approved shall be entitled to participate in the Final Dividend; and any claim which is rejected shall be subject to and governed by California Insurance Code Section 1032 and may participate in the Final Dividend only if it is allowed after compliance with such Section.

6. As soon as practical after the Final Dividend Claims Bar Date, on a date determined by the Commissioner in his sole discretion (the "Final Dividend Determination Date"), the Commissioner shall determine the total liabilities of the Mission Companies and/or the Mission Trusts as a result of all allowed claims and shall determine the total assets available to discharge such claims and the Final Dividend payable to the holder of an allowed claim (including IGAs) shall be calculated by the "Final Dividend Formula," the numerator of which shall be the total "Available Assets" and the denominator of which shall be the "Total Liabilities" of the Mission Companies and/or the Mission Trusts. The Total Liabilities of the Mis-

sion Companies and/or the Mission Trusts shall include a reserve for future operational expenses of the Mission Trusts.

The Commissioner's determination of the Available Assets, the Total Liabilities and the Final Dividend Formula shall be a part of his administrative determination as to allowance of claims and the Commissioner shall file notice of his determination of Available Assets, the Total Liabilities and the Final Dividend Formula with the Court and shall provide reasonable notice thereof to the holders of all allowed claims.

Any holder of an allowed claim shall have thirty (30) days after such notice to seek a show-cause order under California Insurance Code Section 1032 to dispute the amount of the Available Assets, Total Liabilities or the Final Dividend. In the absence of obtaining such a show-cause order and a subsequent order from this Court providing for the modification of such determinations, the Commissioner's determinations of the Available Assets, Total Liabilities and Final Dividend Formula shall be conclusive and binding.

The Final Dividend shall be determined by multiplying the Final Dividend Formula times the non-contingent, liquidated, and determined amount of each allowed claim.

7. The liability of all reinsurers to the Mission Companies and/or the Mission Trusts shall be determined based upon the present value of all claims which have been or may be allowed herein based upon the procedures utilized heretofore and as set out above, as determined by reasonable and standard actuarial practices and claims procedures; such liability shall include the present value of the future development and/or Incurred But Not Reported loss component of any such claims.

8. After the calculation of the Final Dividend Formula, the Commissioner shall, in due course, discharge all claims allowed in accordance with the foregoing proce-

dures by paying each claimant, including IGAs, an amount equal to the Final Dividend Payment.

9. Any claims which are not liquidated and determined by the Final Dividend Claims Bar date may not participate in any portion of the Final Dividend.

10. The Commissioner shall continue to marshal the assets of the Mission Companies and/or the Mission Trusts and shall conclude pending litigation as quickly as practical. Any further net sums recovered after the Final Dividend Determination Date shall be distributed by the Commissioner, less operating expenses and appropriate reserves as determined by the Commissioner in his sole discretion, to the holders of allowed claims pro rata based upon the Final Dividend Formula.

11. The Commissioner shall wind up the affairs of the Mission Companies and/or the Mission Trusts and file a final report to the Court as soon as practical after carrying out the foregoing.

12. The obligations of IGA's, if any, for the Tail developing on "covered" claims will be unaffected by the Final Dividend Approach. IGA's shall continue to be liable for "covered" claims within the meaning of the applicable laws of the various states.

13. The foregoing Final Dividend Approach is reasonable and necessary to the welfare of the public and of the policyholders and creditors of the Mission Companies and/or the Mission Trusts.

14. All prior injunctions and other orders of this Court, except to the extent expressly modified herein, are reaffirmed and remain in full force and effect. All powers or authority granted to the Commissioner herein are in addition to and not in limitation of the powers of the Commissioner under the Insurance Code and the applicable case law.

DATED: Dec. 28, 1994

/s/ Kurt J. Lewin
THE HONORABLE KURT J. LEWIN
Judge of the Superior Court

EXHIBIT A

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No.: C 572 724

JOHN R. GARAMENDI, Insurance Commissioner
of the State of California,
Applicant,

vs.

MISSION INSURANCE COMPANY,
a California corporation,
Respondent.

Consolidated with Case Numbers
C 576 324; C 576 416; C 576 323;
C 576 325; C 629709

NOTICE OF ORDER APPROVING INSURANCE
COMMISSIONER'S FINAL LIQUIDATION
DIVIDEND PLAN, ESTABLISHING FINAL CLAIMS
BAR DATE FOR CONTINGENT, UNLIQUIDATED,
AND/OR UNDETERMINED CLAIMS, AND
RELATED ORDERS

[PROPOSED]

TO ALL POLICYHOLDERS, CREDITORS, INSUR-
ANCE GUARANTY ASSOCIATIONS, AND OTHER
PERSONS AND ENTITIES INTERESTED IN MIS-

SION ISURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST (collectively the "Mission Companies" or the "Mission Trusts"), OR THEIR ASSETS, WHO PREVIOUSLY TIMELY AND PROPERLY FILED CONTINGENT, UNLIQUIDATED, AND/OR UNDETERMINED CLAIMS:

PLEASE TAKE NOTICE THAT:

On December —, 1994, this Court entered its Order Approving Final Liquidation Dividend Plan, Establishing Final Claims Bar Date for Contingent, Unliquidated, and/or Undetermined Claims and Related Orders (the "Order"), which order provides as follows:

1. The Application of the Insurance Commissioner to Establish Final Liquidation Dividend Plan, to Establish Final Claims Bar Date for Contingent, Unliquidated, and/or Undetermined Claims, and for Related Orders is granted. A hearing is hereby set for 10:00 a.m. on the — day of February, 1995, in Department 4, at which time any and all persons or other legal entities desiring to object to, comment on, present evidence or comments with respect to, or in any other way deal with the Commissioner's Application or this Order must do so (the "Hearing"). Any such objections, comments, or other matters relating to the subject matter herein must be made at such hearing or the same shall be irrevocably deemed waived.

2. Any and all contingent, unliquidated, and/or undetermined claims, of any kind or nature, which were previously filed on a timely basis (by September 12, 1987), and in a proper form, must be amended as liquidated claims or otherwise converted to determined and non-contingent claims by use of and pursuant to the instruc-

tions in a form to be approved by this Court prior to the Hearing. Such amended claims must be filed with the Commissioner no later than August —, 1995 (the "Final Dividend Claims Bar Date"), together with proper proofs thereof, in accordance with the provisions of California Insurance Code Section 1010, *et seq.*, including but not limited to Section 1023 of the California Insurance Code. Any contingent, unliquidated, and/or undetermined claims not so amended by the Final Dividend Claims Bar Date shall be conclusively deemed forever waived. The rights and liabilities of the Mission Companies and/or the Mission Trusts and of creditors, policyholders, shareholders and all other persons interested in the assets of the Mission Companies and/or the Mission Trusts, including the State of California, have heretofore been fixed as of February 24, 1987 and shall remain so fixed. This Court continues to assert and to maintain sole and exclusive jurisdiction, to the exclusion of all other courts or tribunals, over and to all assets of the Mission Companies and/or the Mission Trusts of whatsoever kind or nature and wherever or however owned or held. No liens, judgments, awards or claims of any kind not entered by this Court in accordance with the previous Orders of this Court, all of which Orders are reaffirmed, shall be valid as against the Mission Companies and/or the Mission Trusts or any of their said assets.

3. The Commissioner shall provide Notice of this Order and the Hearing in the form and content of Exhibit A annexed hereto all policyholders, IGAs and other creditors or entities interested in the assets of the Mission Companies and/or the Mission Trusts or in these proceedings who previously timely and properly filed contingent, unliquidated, and undetermined claims. This Notice shall be provided by mailing a copy of the Notice to all policyholders, IGAs and other creditors or entities interested in the assets of the Mission Companies and/or the

Mission Trusts or in these proceedings who previously timely and properly filed contingent, unliquidated, and undetermined claims at their addresses as shown in the records of the Mission Companies and/or the Mission Trusts and by publication in *The Wall Street Journal* and *U.S.A. Today* for a period of at least two days and in a newspaper of general circulation, published in Los Angeles County, once a week for four consecutive weeks. The Commissioner shall provide the same notice to the various state insurance commissioners, or equivalent, and the various state insurance guaranty associations, or equivalent. The Court finds that such notice is reasonably calculated to and does provide fair, reasonable and adequate notice of these proceedings, the Application, this Order, and the Hearing.

4. Any and all claims previously barred by prior orders or procedures herein shall remain barred. Any and all claims previously timely and properly filed as, contingent, unliquidated, or undetermined claims, in whole or in part, are forever barred from participation in the "Final Dividend" (as defined below) unless they are amended to be liquidated and/or determined claims upon or prior to the Final Dividend Claims Bar Date. A "Contingent," "Unliquidated" or "Undetermined Claim" within the meaning of these proceedings shall be as defined in California Insurance Code Section 1025 as any claim or demand upon which a right of action had accrued at the date of the order of liquidation herein upon which the liability has not been determined or the amount thereof liquidated. Accordingly, any previously timely and properly filed Contingent, Unliquidated and/or Undetermined Claim must be made certain, both as to liability of the Mission Companies and/or the Mission Trusts or one of them, and as to the amount of such liability no later than the Final Dividend Claims Bar Date or such claims shall be forever barred from any participation in the Final Dividend. Any claim which is partly Contingent, Unliquidated and/or

Undetermined shall be subject to these provisions as to the Contingent, Unliquidated and/or Undetermined portions of such claim. If a claim is certain as to liability, but Contingent, Undetermined, or Unliquidated as to amount, the amount may be determined by application of standard actuarial principles which calculate the present value of the claim in a reasonable manner, subject to the Commissioner's agreement based upon the opinions and actuarial studies of an independent actuarial firm retained by the Commissioner in his sole discretion.

5. Within a reasonable time after the Final Dividend Claims Bar Date, on a date determined by the Commissioner in his sole discretion, the Commissioner shall cause all such amended claims to be reviewed, evaluated and either accepted or rejected; any such claim which is approved shall be entitled to participate in the Final Dividend; and any claim which is rejected shall be subject to and governed by California Insurance Code Section 1032 and may participate in the Final Dividend only if it is allowed after compliance with such Section.

6. As soon as practical after the Final Dividend Claims Bar Date, on a date determined by the Commissioner in his sole discretion (the "Final Dividend Determination Date"), the Commissioner shall determine the total liabilities of the Mission Companies and/or the Mission Companies as a result of all allowed claims and shall determine the total assets available to discharge such claims and the Final Dividend payable to the holder of an allowed claim (including IGAs) shall be calculated by the "Final Dividend Formula," the numerator of which shall be the total "Available Assets" and the denominator of which shall be the "Total Liabilities" of the Mission Companies and/or the Mission Trusts. The Total Liabilities of the Mission Companies and/or the Mission Trusts shall include a reserve for future operational expenses of the Mission Companies and/or the Mission Trusts.

The Commissioner's determination of the Available Assets, the Total Liabilities and the Final Dividend Formula shall be a part of his administrative determination as to allowance of claims and the Commissioner shall file notice of his determination of Available Assets, the Total Liabilities and the Final Dividend Formula with the Court and shall provide reasonable notice thereof to the holders of all allowed claims.

Any holder of an allowed claim shall have thirty (30) days after such notice to seek a show-cause order under California Insurance Code Section 1032 to dispute the amount of the Available Assets, Total Liabilities or the Final Dividend. In the absence of obtaining such a show-cause order and a subsequent order from this Court providing for the modification of such determinations, the Commissioner's determinations of the Available Assets, Total Liabilities and Final Dividend Formula shall be conclusive and binding.

The Final Dividend shall be determined by multiplying the Final Dividend Formula times the non-contingent, liquidated, and determined amount of each allowed claim.

7. The liability of all reinsurers to the Mission Companies and/or the Mission Trusts shall be determined based upon the present value of all claims which have been or may be allowed herein based upon the procedures utilized heretofore and as set out above, as determined by reasonable and standard actuarial practices and claims procedures; such liability shall include the present value of the future development and/or Incurred But Not Reported loss component of any such claims.

8. After the calculation of the Final Dividend Formula, the Commissioner shall, in due course, discharge all claims allowed in accordance with the foregoing procedures by paying each claimant, including IGAs, an amount equal to the Final Dividend Payment.

9. Any claims which are not liquidated and determined by the Final Dividend Claims Bar date may not participate in any portion of the Final Dividend.

10. The Commissioner shall continue to marshal the assets of the Mission Companies and/or the Mission Trusts and shall conclude pending litigation as quickly as practical. Any further net sums recovered after the Final Dividend Determination Date shall be distributed by the Commissioner, less operating expenses and appropriate reserves as determined by the Commissioner in his sole discretion, to the holders of allowed claims pro rata based upon the Final Dividend Formula.

11. The Commissioner shall wind up the affairs of the Mission Companies and/or the Mission Trusts and file a final report to the Court as soon as practical after carrying out the foregoing.

12. The obligations of IGA's, if any, for the Tail developing on "covered" claims will be unaffected by the Final Dividend Approach. IGA's shall continue to be liable for "covered" claims within the meaning of the applicable laws of the various states.

13. The foregoing Final Dividend Approach is reasonable and necessary to the welfare of the public and of the policyholders and creditors of the Mission Companies and/or the Mission Trusts.

14. All prior injunctions and other orders of this Court, except to the extent expressly modified herein, are reaffirmed and remain in full force and effect. All powers or authority granted to the Commissioner herein are in addition to and not in limitations of the powers of the Commissioner under the Insurance Code and the applicable case law.

DATED: _____

KARL L. RUBINSTEIN
 Special Deputy
 Insurance Commissioner
 DANA CARLI BROOKS
 MELISSA S. KOOISTRA
 RUBINSTEIN & PERRY, P.C.

By: _____
 KARL L. RUBINSTEIN
 Attorneys for
 Insurance Commissioner

EXHIBIT 4

STATE OF CALIFORNIA
 DEPARTMENT OF INSURANCE
 600 South Commonwealth Avenue
 Los Angeles, California 90005

GEORGE DEUKMEJIAN, Governor

[State Seal]

January 11, 1988

ALLSTATE INSURANCE COMPANY
 D.W. K.
 51 W. Higgins Rd.
 South Barrington IL 60010

Reference: Liquidation of Mission Insurance Company,
 Mission National Insurance Company, En-
 terprise Insurance Company, Holland-Amer-
 ica Insurance Company, Mission Reinsur-
 ance Corporation

Liquidator's Claim No: R2764
 Reinsurance Treaty or certificate No:
 Clm # 43
 Date of Loss:

The Insurance Commissioner, in her capacity as Liquida-
 tor, acknowledges receipt of your claim filed in the liqui-
 dation proceedings of the above referenced company.
 This acknowledgment does not constitute approval nor
 denial of your claim.

Please continue to provide the company with your nor-
 mal reports and direct them to:

Mission Insurance Company in Liquidation
 Reinsurance Accounting
 2600 Wilshire Boulevard
 Los Angeles, California 90057
 Attention: John Horner

The reports and other data you supply to the Reinsurance Accounting Section will be considered supplements to your claim.

Please use the above Liquidator's Claim No. in any future correspondence and advise this office in writing of any change of address.

You should only receive further correspondence concerning your claim if more information is needed, or if your claim is rejected in whole or in part.

Very truly yours,

Ronald G. Rosen
Deputy Insurance Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
P.O. Box 76869
Los Angeles, California 90076-0869
(213) 389-9500

Reinsurance Treaty or Certificate number: See attached listing

Allstate Claim No. 43

PROOF OF CLAIM
(For reinsurers)

(Please Print) Total Amount of Claim: \$ Contingent and Undetermined

Brief Explanation of Claim: Business assumed from Mission Group (use additional pages if necessary).

NOTE

Please supply any SUPPORTING DOCUMENTS such as contracts, bills, court judgments, police reports, etc., if they were not previously supplied.

Social Security No. or Tax I.D. No.: 36-0719665

Name: Allstate Insurance Company

Address: 51 West Higgins Road, South Barrington, IL 60010

Telephone No.: (312) 551-2091

UNLESS NOTED HEREIN, I ALONE AM ENTITLED TO FILE THIS CLAIM. NO OTHERS HAVE AN INTEREST THEREIN. THE CLAIM IS UNSECURED. NO PAYMENTS HAVE BEEN MADE THEREON. THE SUM CLAIMED IS JUSTLY OWING AND THERE IS NO OFFSET.

I DECLARE, UNDER PENALTY OF PERJURY,
THAT THE ABOVE INFORMATION IS TRUE AND
CORRECT.

/s/ [Illegible]
Signature of Claimant

8-28-87
Date

Mail the completed form and supporting documents
to: The Insurance Commissioner as Liquidator, P.O.
Box 76869, Los Angeles, California 90076-0869.
Notify the Liquidator, In writing, of all changes of
address.

Final Date for Filing is: September 12, 1987

Reference:

EXHIBIT "A" to CEDING REINSURERS PROOF OF CLAIM

Treaty or Contract Identification No.: See attached
listing

Facultative Certificate No.:

Intermediary or Broker: See attached listing

Paid Losses ¹ as of _____ : \$ _____
(Date)

Cases Reserves as of _____ : \$ _____
(Date)

Estimated IBNR as of _____ : \$ _____

Other: _____ : \$ _____
(Explain)

Total Without Regard to any offsets
claimed in arriving at any net amounts
you claim are due: \$ _____

OFFSETS ³:

Allstate reserves the right to offset balances on as-
sumed contracts from companies in the Mission
Group against amounts due the Allstate Group on
business ceded to the Mission Group.

¹ This amount of your claim will be considered as a specific,
determined amount. The remainder will be deemed as an unde-
termined and contingent amount.

² All amounts shall be stated in U.S. Dollars.

³ You are requested to explain the nature and basis of offsets
which you are using to arrive at amounts owed to you, if any.
Offsets should include the premiums you owe, if any. Please see
the instructions in the letter from the Liquidator. You may attach
any additional explanations regarding these offsets.

Allstate further reserves the right to amend the figures on this claim as further information becomes available.

\$ _____

TREATY NO.	BROKER	BUSINESS ASSUMED FROM
881	Carpenter	Mission American
1680	Carpenter	" "
3022	Carpenter	" "
10061	Carpenter	" "
362	Intere	Mission Ins. Co.
333	Sterling	" " "
499	Intere	" " "
988	Intere	" " "
10231	Intere	" " "
3524	Carpenter	" " "
5337	Reins. Co.	" " "

EXHIBIT 5

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
P.O. Box 76869
Los Angeles, California 90076-0869
(213) 389-9500

Reinsurance Treaty or
Certificate Number:

Contingent
Various—See attached
Allstate Claim No: 24

PROOF OF CLAIM
(For Reinsurers)

(Please Print) Total amount of claim: \$ Contingent
and Undetermined

BRIEF EXPLANATION OF CLAIM: Business ceded
to the Mission Insurance Company from Allstate Insurance
Company as the successor to Northbrook Excess &
Surplus Insurance Company.

(use additional pages if necessary).

NOTE

Please supply any SUPPORTING DOCUMENTS
such as contracts, bills, court judgments, police reports,
etc., if they were not previously supplied.

Social Security No. or Tax I.D. No.: 36-0719665

Name: Allstate Insurance Company

Address: 51 W. Higgins Road, South Barrington,
IL 60010

Telephone No.: (312) 551-2091

UNLESS NOTED HEREIN, I ALONE AM ENTITLED TO FILE THIS CLAIM. NO OTHERS HAVE AN INTEREST THEREIN. THE CLAIM IS UNSECURED. NO PAYMENTS HAVE BEEN MADE THEREON, THE SUM CLAIMED IS JUSTLY OWING AND THERE IS NO OFFSET.

I DECLARE, UNDER PENALTY OF PERJURY, THAT THE ABOVE INFORMATION IS TRUE AND CORRECT.

/s/ [Illegible] 8-28-87
Signature of Claimant Date

Mail the completed form and supporting documents to: The Insurance Commissioner as Liquidator, P.O. Box 76869, Los Angeles, California 90076-0869. Notify the Liquidator. In writing, of all changes of address.

Final Date for Filing is: September 12, 1987

Reference:

EXHIBIT "A" TO CEDING REINSURERS PROOF OF CLAIM

Treaty or Contract Identification No.: Various (see attached)

Facultative Certificate No.: Various

Intermediary or Broker: Various

Paid Losses ¹ as of March 31, 1987: \$.00 ²

Case Reserves as of March 31, 1987: \$.00

Estimated IBNR as of March 31, 1987: \$.00

Other: (explain) _____ \$.00

Total, without regard to any offsets
Claimed in arriving at any net amounts
you claim are due: \$.00

OFFSETS ³: Allstate reserves the right to offset the amounts due to companies in the Mission Group on reinsurance assumed by Allstate against amounts due Allstate for business ceded to the Mission Group. Allstate further reserves the right to amend the figures on this claim as further information becomes available.

¹ This amount of your claim will be considered as a specific, determined amount. The remainder will be deemed as an undetermined and contingent amount.

² All amounts shall be stated in U.S. Dollars.

³ You are requested to explain the nature and basis of offsets which you are using to arrive at amounts owed to you, if any. Offsets should include the premiums you owe, if any. Please see the instructions in the letter from the Liquidator. You may attach any additional explanations regarding these offsets.

ALLSTATE INSURANCE COMPANY
NESCO DIVISION
REPORT 100257
ACCOUNT SUMMARY
AS OF MARCH 31 1987

160

Contract Number	Description	Ceded Assumed	Broker	Partic.	Eff. Date	Account Receivable	Account Payable	Outstanding Reserves	UPR
202013	Facultative	Ceded	A. Miller	Various	Various	.00	.00	0	.00
100030	Facultative	Ceded	Direct	Various	Various	.00	.00	0	.00
202085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
202085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
202035	Facultative	Ceded	Rein. Fac	Various	Various	.00	.00	0	.00
200138	Facultative	Ceded	JL Kelley	Various	Various	.00	.00	0	.00
202016	Facultative	Ceded	Ireland	Various	Various	.00	.00	0	.00
202058	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00
200101	Facultative	Ceded	Kerwick	Various	Various	.00	.00	0	.00
200133	Facultative	Ceded	TA Greene	Various	Various	.00	.00	0	.00
200133	Facultative	Ceded	TA Greene	Various	Various	.00	.00	0	.00
000302	Cat XS 1st Cat	Ceded	GL Hodson	Various	4/1/75	.00	.00	0	.00
200128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200129	Facultative	Ceded	GL Hodson	Various	Various	.00	.00	0	.00
200116	Facultative	Ceded	Dependabl	Various	Various	.00	.00	0	.00
200035	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00

161

200095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
204128	Facultative	Ceded	Nova Re.	Various	Various	.00	.00	0	.00
200085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
204131	Facultative	Ceded	Triad Uno	Various	Various	.00	.00	0	.00
200071	Facultative	Ceded	Peterson	Various	Various	.00	.00	0	.00
203128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
202135	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200036	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
203085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200043	Facultative	Ceded	Baringer	Various	Various	.00	.00	0	.00
203085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
209141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
100030	Facultative	Ceded	Direct	Various	Various	.00	.00	0	.00
202071	Facultative	Ceded	Peterson	Various	Various	.00	.00	0	.00
200013	Facultative	Ceded	A. Miller	Various	Various	.00	.00	0	.00
202095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
202116	Facultative	Ceded	Dependabl	Various	Various	.00	.00	0	.00
204128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200135	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
202013	Facultative	Ceded	A. Miller	Various	Various	.00	.00	0	.00
000305	Cat XS 1st Cat	Ceded	GL Hodson	3.00	4/1/78	.00	.00	0	.00
200141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
200095	Facultative	Ceded	Rein. Fac	Various	Various	.00	.00	0	.00
203058	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00

Contract Number	Description	Ceded Assumed	Broker	Partic.	Eff. Date	Account Receivable	Account Payable	Outstanding Reserves	UPR
200044	Facultative	Ceded	Baringer	Various	Various	.00	.00	0	.00
204085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200058	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00
203116	Facultative	Ceded	Dependabl	Various	Various	.00	.00	0	.00
200125	Facultative	Ceded	Reins. Ser	Various	Various	.00	.00	0	.00
200125	Facultative	Ceded	Int. Serv.	Various	Various	.00	.00	0	.00
200115	Facultative	Ceded	Tre Fac	Various	Various	.00	.00	0	.00
206141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
200115	Facultative	Ceded	Tre Fac	Various	Various	.00	.00	0	.00
205125	Facultative	Ceded	Reins Ser	Various	Various	.00	.00	0	.00
200101	Facultative	Ceded	Kerwick	Various	Various	.00	.00	0	.00
200095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
204141	Facultative	Coded	E&S Inter	Various	Various	.00	.00	0	.00
200058	Facultative	Coded	Carpenter	Various	Various	.00	.00	0	.00
202128	Facultative	Coded	Nova Re.	Various	Various	.00	.00	0	.00
200035	Facultative	Coded	Rein. Fac.	Various	Various	.00	.00	0	.00
202129	Facultative	Coded	GL Hodson	Various	Various	.00	.00	0	.00
000505	Cat XS 1st Cat.	Coded	GL Hodson	Various	4/1/79	.00	.00	0	.00
203071	Facultative	Coded	Peterson	Various	Various	.00	.00	0	.00
207095	Facultative	Coded	Rein. Fac	Various	Various	.00	.00	0	.00
200107	Facultative	Coded	Intere	Various	Various	.00	.00	0	.00
204138	Facultative	Coded	JL Kelley	Various	Various	.00	.00	0	.00

200095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
208138	Facultative	Ceded	JL Kelley	Various	Various	.00	.00	0	.00
200085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
204128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
202035	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
202071	Facultative	Ceded	Peterson	Various	Various	.00	.00	0	.00
200129	Facultative	Ceded	GL Hodson	Various	Various	.00	.00	0	.00
203128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
207135	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
202085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200095	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
202058	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00
200035	Facultative	Ceded	Rein. Fac.	Various	Various	.00	.00	0	.00
202128	Facultative	Ceded	Nova Rein	Various	Various	.00	.00	0	.00
200129	Facultative	Ceded	GL Hodson	Various	Various	.00	.00	0	.00
202141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
202085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
200135	Facultative	Coded	Pri	Various	Various	.00	.00	0	.00
205133	Facultative	Coded	TA Greene	Various	Various	.00	.00	0	.00
200095	Facultative	Coded	Rein. Fac.	Various	Various	.00	.00	0	.00
204128	Facultative	Coded	Nova Rein	Various	Various	.00	.00	0	.00
200058	Facultative	Coded	Carpenter	Various	Various	.00	.00	0	.00

Contract Number	Description	Ceded Assumed	Broker	Partic.	Eff. Date	Account Receivable	Account Payable	Outstanding Reserves	UPR
203141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
200125	Facultative	Ceded	Intntl. Re	Various	Various	.00	.00	0	.00
204138	Facultative	Ceded	JL Kelley	Various	Various	.00	.00	0	.00
204141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
200085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
204004	Facultative	Ceded	Carpenter	Various	Various	.00	.00	0	.00
200138	Facultative	Ceded	JL Kelley	Various	Various	.00	.00	0	.00
205141	Facultative	Ceded	E&S Inter	Various	Various	.00	.00	0	.00
203085	Facultative	Ceded	Pri	Various	Various	.00	.00	0	.00
000163	4 Mln XS 1 Mln	Ceded	EH Walker	3.00	1/1/78	.00	.00	0	.00
000147	4 Mln XS 1 Mln	Ceded	EH Walker		1/1/76	.00	.00	0	.00
000155	4 Mln XS 1 Mln	Ceded	EH Walker		1/1/77	.00	.00	0	.00
000148	5 Mln XS 5 Mln	Ceded	EH Walker		1/1/76	.00	.00	0	.00
000607	5 Mln XS 5 Mln	Ceded	EH Walker	3.00	1/1/80	.00	.00	0	.00
000113	5 Mln XS 5 Mln	Ceded	EH Walker		1/1/75	.00	.00	0	.00
000600	4 Mln XS 1 Mln	Ceded	EH Walker		1/1/79	.00	.00	0	.00
000156	5 Mln XS 5 Mln	Ceded	EH Walker		1/1/77	.00	.00	0	.00
000160			EH Walker			.00	.00	0	.00
000601	5 Mln XS 5 Mln	Ceded	EH Walker	3.00	1/1/79	.00	.00	0	.00
000112	4 Mln XS 1 Mln	Ceded	EH Walker		1/1/75	.00	.00	0	.00
000164	5 Mln XS 5 Mln	Ceded	EH Walker	3.00	1/1/78	.00	.00	0	.00
000620	5 Mln XS 5 Mln	Ceded	EH Walker	3.00	1/1/81	.00	.00	0	.00
000161						.00	.00	0	.00
Total Mission Insurance Company *						.00	.00	0	.00
Grand Total						.00	.00	0	.00

EXHIBIT 6

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELESDate: February 25, 1994
Honorable Kurt J. Lewin, Judge

C 572 724

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,*Plaintiff*

vs.

MISSION INSURANCE COMPANY, etc.
and Consolidated Cases,*Defendant*

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MATTER ON THE MOTION OF DEFENDANT TO ENFORCE REINSURANCE COMMUTATION AND SETTLEMENT AGREEMENT WITH IMPERIAL CASUALTY AND INDEMNITY COMPANY, AND FOR JUDGMENT PURSUANT TO C.C.P. SECTION 664 AND REQUEST FOR ATTORNEYS' FEES, HERETOFORE ARGUED AND SUBMITTED; THE COURT NOW RULES AS FOLLOWS:

ORDER

The holding of the Supreme Court in *Prudential Reinsurance Co. v. Superior Court* (1992) 3 Cal. 4th 1118, although permitting setoff, strictly limits it to a company to company basis. Notwithstanding the universal recognition that setoff in insolvency proceedings constitutes an unjustified preference, the Court held that setoff was

clearly compelled by the clear language of *Insurance Code* § 1031.

The Court was emphatic, however, that the setoff not be expanded beyond entities which shared mutuality of identity and capacity.

"We conclude that such an unwarranted expansion of the setoff doctrine would permit an exponential increase in the amount subsidiaries could set off to the detriment of liquidation estates.", *Prudential Re-insurance Co. v. Superior Court, supra*, 1137.

Notwithstanding Imperial's argument to the contrary, the issue was squarely addressed and resolved by the Court as contemplated by the settlement agreement sought to be enforced. There is no basis in law or equity nor under the settlement agreement to apply any tortured analysis to broaden the doctrine of setoff.

Therefore, and for the reasons articulated by this Court at the hearing on these motions, setoff is available only to the extent and between the specific entities as explicitly set out in the subject cession agreements.

A COPY OF THIS MINUTE ORDER IS MAILED THIS DATE BY U.S. MAIL ON BOTH APPEARING SIDES.

[Filed Mar. 8, 1994]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

(Title Omitted in Printing)

ORDER GRANTING INSURANCE
COMMISSIONER'S MOTION TO ENFORCE
REINSURANCE COMMUTATION AND
SETTLEMENT AGREEMENT WITH
IMPERIAL CASUALTY AND INDEMNITY
COMPANY AND FOR JUDGMENT PURSUANT
TO CCP SECTION 664.6 AND REQUEST
FOR ATTORNEYS' FEES

The Insurance Commissioner's Motion to Enforce Re-insurance Commutation and Settlement Agreement with Imperial Casualty and Indemnity Company and for Judgment pursuant to Code of Civil Procedure 664.6 and Request for Attorneys' Fees has been duly Noticed and having come before this Court, Department 4, the Hon. Kurt J. Lewin presiding, on November 18, 1993, and the Court having considering the Motion, IT IS HEREBY ORDERED THAT:

The Court has issued its Order dated February 25, 1994, a copy of which is attached hereto as Exhibit A, embodying the reasoning behind the following Order.

The Motion of the Insurance Commissioner to Enforce Reinsurance Commutation and Settlement Agreement with Imperial Casualty and Indemnity Company, and for Judgment pursuant to Code of Civil Procedure, Section 664 and Request for Attorneys' Fees is granted.

DATED: Mar. 8, 1994

/s/ Kurt J. Lewin
 THE HONORABLE KURT J. LEWIN
 Judge of the Superior Court

[Exhibit A Omitted in Printing]

IN THE UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT

 No. 91-55855

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, MISSION REINSURANCE CORPORATION TRUST, and HOLLAND-AMERICA INSURANCE COMPANY TRUST,

Plaintiff-Appellee,

vs.

ALLSTATE INSURANCE COMPANY,
Defendants-Appellants.

 On Appeal from the United States District Court
 for the Central District of California

RESPONSE TO PETITION FOR REHEARING AND
 SUGGESTION FOR REHEARING EN BANC

 I.

INTRODUCTION

The pending Petition for Rehearing, at nearly every turn, misapprehends the applicable law. The principal argument is that the underlying action to collect money damages on behalf of the Mission Group of Insurance Companies ("Mission") is actually equitable in nature,

because the California Insurance Commissioner, suing as Mission's liquidator ("the Liquidator"), has asserted a claim for declaratory relief in addition to a claim for money damages. The Liquidator's contention that declaratory relief claims are equitable in nature inexplicably ignores three decisions of this Court—dating back more than 50 years—which hold that declaratory relief claims, having their origin in a federal statute, are neither equitable nor legal *per se*. Instead, in determining whether declaratory relief claims are legal or equitable, the court must look to the underlying nature of the dispute. Here, that inquiry could not be simpler, since this action has but one fundamental objective: to recover money damages for the Mission estate. Such actions have been universally recognized as ones at law from times predating *Marbury v. Madison*, and this is precisely the kind of case routinely decided by federal courts sitting in diversity.

The Liquidator also urges rehearing based on a recent letter from Allstate's counsel to the Liquidator's attorneys. If rehearing were granted on this basis, the Court would be establishing a proposition no less novel than this: Rehearing should be granted when the parties' counsel do not agree on the scope or import of a panel's decision. The mere statement of this proposition is its own refutation.

The Liquidator next argues that the panel's decision overlooks recent decisions of the United States Supreme Court and other federal courts. But the authorities cited by the Liquidator range from inconsequential to simply irrelevant. For instance, the Liquidator relies upon a Supreme Court decision, *Tafflin v. Levitt*, 493 U.S. 455, 110 S. Ct. 792 (1990), which we are told affirmed the Fourth Circuit's application of *Burford* abstention in cases at law. The Liquidator ignores the fact that *certiorari* was granted in *Tafflin* limited to the question of whether state courts have concurrent jurisdiction over RICO actions. Thus, the *Burford* abstention doctrine was simply not before the Supreme Court in the *Tafflin* case.

Finally, the Liquidator argues that the panel's decision creates an intra-circuit conflict regarding the appealability of remand orders. Again, the argument is simply wrong. As shown below, there is no inconsistency between the panel's decision and any other published opinion of this Court. For each of the above reasons, discussed in more detail below, the Liquidator's Petition for Rehearing should be denied.

II.

ARGUMENT

A. *The Panel Correctly Characterized This Action As Legal In Nature.*

The Liquidator's principal argument in support of his Petition for Rehearing is that the panel erroneously concluded that this action is legal rather than equitable in nature. Thus, the Liquidator argues, the panel's decision is erroneous even if *Burford* abstention is limited to equitable proceedings.

This argument reflects an about-face by the Liquidator. In his brief on appeal, the Liquidator argued strenuously against limiting the *Burford* abstention doctrine to equitable actions, without even suggesting that the present suit should be viewed as equitable in nature. See Appellee's Answering Brief at pages 29-33.¹

The Liquidator had good reason for not contending that this action is equitable in nature. This contention is flatly rejected by the controlling decisions, including

¹ The Liquidator's failure to raise this issue earlier is itself a ground for denial of the Petition for Review, since "[p]arties generally may not insert new issues or arguments for the first time in a petition for rehearing." 2 D. Nelson, C. Goelz & M. Watts, 2 FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE ¶ 11:35 (1995) (emphasis in original; citing *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir.), cert. denied, 113 S. Ct. 297 (1992); *Partenweederei, M.S. Belgrano v. Weigel*, 313 F.2d 423, 424-25 (9th Cir. 1962), cert. denied, 373 U.S. 904 (1963)).

three decisions of this Court which the Liquidator inexplicably fails to cite.

1. *Declaratory Relief Claims Are Neither Legal Nor Equitable Per Se.*

As the Liquidator concedes in a footnote, "some federal courts have held that declaratory judgment actions, as creatures of statute, are inherently neither legal nor equitable." Petition for Rehearing at page 3, n.3. These "federal courts" include this very Court and, indeed, every other Circuit that has looked at the issue. In fact, it is now settled beyond dispute that declaratory relief claims cannot be classified as either legal or equitable *per se*. As a result, in determining whether a declaratory relief claim is legal or equitable, courts look to "the basic nature of the plaintiffs' case and the manner in which the issues would likely have arisen" in the absence of the Declaratory Judgment Act. *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 493 (1st Cir. 1992). *Accord Wallace v. Norman Industries, Inc.*, 467 F.2d 824, 827 (5th Cir. 1972) ("a declaratory judgment action cannot be termed as either inherently at law or in equity. When classification has been required, courts have examined the basic nature of the issues involved to determine how they would have arisen had Congress not enacted the Declaratory Judgment Act."); *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 824 (2d Cir. 1968) ("A declaratory judgment action is a statutory creation, and by its nature is neither fish nor fowl, neither legal nor equitable. Where, as here, such an action has required classification, the courts have looked to the basic nature of the suit in which the issues involved would have arisen if Congress had not created the Declaratory Judgment Act.")

In *Moretrench American Corp. v. S.J. Groves & Sons Co.*, 839 F.2d 1284 (7th Cir. 1988), Judge Posner, writing for a unanimous court, applied the above principles

in determining whether an action should be deemed equitable so as to allow an interlocutory appeal under the "Enelow-Ettelson" doctrine. In language equally applicable here, Judge Posner observed:

Moretrench's suit against [the defendant] GAB is a suit at law; it seeks damages for breach of contract. *The fact that it also seeks a declaratory judgment is irrelevant.*

839 F.2d at 1286 (emphasis added).

Indeed, this Court has followed the above rule for more than 50 years. In 1939, this Court observed that "the nature of an action for declaratory relief is correctly stated in the appellee's brief. It 'is neither legal nor equitable, but *sui generis*.'" *Pacific Indemnity Co. v. McDonald*, 107 F.2d 446, 448 (9th Cir. 1939). This Court most recently reaffirmed this holding in *Transamerica Occidental Life Insurance Co. v. Digregorio*, 811 F.2d 1249 (9th Cir. 1987):

"Declaratory relief is neither strictly equitable nor legal . . ." [Citations.] A particular declaratory judgment draws its equitable or legal substance from the nature of the underlying controversy.

811 F.2d at 1251 (quoting E. Borchard, *DECLARATORY JUDGMENTS* 399 (2d ed. 1941)). *See also Beacon Theatres, Inc. v. Westover*, 252 F.2d 864, 876 (9th Cir. 1958), *rev'd on other grounds*, 359 U.S. 500 (1959) ("Where a typical complaint seeking declaratory relief, and nothing more, is filed . . . the question as to the mode of trial 'should be governed by a determination as to whether the basic nature of the issue is 'legal' or equitable.'").

Although it seems clear that federal law governs the determination of whether this case is legal or equitable in nature; it is worth noting that—contrary to the Liquidator's contentions—the foregoing principles also find repeated expression in the California decisions. As the

Liquidator observes, some California decisions have suggested, usually in dictum, that declaratory relief actions are equitable in nature. Typically, these decisions make such observations merely to acknowledge the Court's discretion in determining whether to grant declaratory relief or in determining the scope of such relief. See, e.g., *Munson v. Linnick*, 255 Cal.App.2d 589, 595, 63 Cal. Rptr. 340 (1967) (trial court had discretion, in granting declaratory judgment respecting the validity of a prior lawsuit, to award damages "under a malicious prosecution theory, as an incident to the declaratory relief sought").²

However, more than 50 years ago, the California Supreme Court recognized—consistent with the federal authorities discussed above—that "declaratory relief is not strictly legal or equitable, but is *sui generis* in nature." *Moss v. Moss*, 20 Cal.2d 640, 128 P.2d 526 (1942). And in a decision rendered only a few months earlier, the California Supreme Court had observed:

[T]he remedy [of declaratory relief] has been stated to be *sui generis* rather than strictly legal or equitable. [Citation] Thus, it has been suggested that where it becomes important under constitutional provisions to classify a particular action for declaratory relief as legal or equitable, the determination should depend upon the issues involved in the particular action.

Gore v. Bingaman, 20 Cal.2d 118, 120, 124 P.2d 17 (1942). A string of more recent Court of Appeal decisions has recognized the continuing vitality of these holdings. See, e.g., *Strauss v. Summerhays*, 157 Cal.App.3d 806, 811, 204 Cal.Rptr. 227, 230 (1984) ("in order to determine whether an action for declaratory relief is equitable or legal, we must look behind the declaratory

² On the merits of this issue, *Munson* was later overruled. See *Babb v. Superior Court*, 3 Cal.3d 841, 850, 92 Cal.Rptr. 179, 184 (1971).

relief label to the gist of the action"); *Escamilla v. California Ins. Guarantee Ass'n*, 150 Cal.3d 53, 57, 197 Cal.Rptr. 463, 465 (1983) ("whether a jury trial is required, in essence, depends upon the nature of issues as equitable or legal. . . . The fact that the initial action . . . sought declaratory relief, of itself, was not determinative of the issues as either legal or equitable").

2. This Action Is Legal, Rather Than Equitable, In Nature.

There can be no doubt as to the application of the foregoing rule in the present case. This is an action to recover money, pure and simple. The underlying nature of this action is indisputably legal rather than equitable. As in the *Moretrench* case, this action "is a suit at law; it seeks damages for breach of contract. The fact that it also seeks a declaratory judgment is irrelevant." 839 F.2d at 1286.

The Liquidator argues, however, that "the underlying State Court insolvency proceedings . . . are inherently equitable in nature." Petition for Rehearing at 4. Even were this true, the underlying lawsuit by the Liquidator against Allstate—which, after all, is separate and apart from the liquidation proceedings themselves—is an action at law, not a special proceeding. Indeed, one of the decisions relied on by the Liquidator establishes this very fact. In *Kinder v. Superior Court*, 78 Cal.App.3d 574, 144 Cal.Rptr. 291 (1978), the Insurance Commissioner sought to invoke a summary "show cause" procedure, within the liquidation proceeding itself, to enforce a debt allegedly owed by an insurance agent to an insolvent insurer. The Superior Court refused to employ such a procedure, and the Court of Appeal affirmed, ruling that a separate action at law had to be filed to pursue balances due the insolvent insurer. The Court held:

The summary process would deprive [defendant] of important rights to which it would be entitled in an independent action. Among them are the right to a

jury trial and, in a trial without a jury, the right to findings of fact and conclusions of law. A jury trial cannot be demanded as a matter of right in a special proceeding unless it is expressly made available by statute. [Citation] The liquidation statute makes no provision for a jury trial in a proceeding had thereunder. . . . Nor are findings required in a special proceeding unless the statute so provides. [Citation] Proceedings under the liquidation provisions of the Insurance Code are special proceedings and findings are not required.

78 Cal.App.3d at 580-81.³

Finally, the Liquidator argues that "Allstate's admitted primary defense of setoff is, in and of itself, a form of equitable relief and would be determined as part of the declaratory relief action." Petition for Rehearing at 4. Again, the Liquidator is simply wrong. In support of his argument, the Liquidator relies solely upon *Prudential Reinsurance Co. v. Superior Court*, 3 Cal.4th 1118, 14 Cal.Rptr.2d 749 (1992), a decision that actually undermines the Liquidator's contention. In that case, the California Supreme Court recognized that the right of set-

³ The Court's reference to the right to trial by jury establishes that it was referring to an "independent action" at law rather than in equity, since in California there is no right to jury trial in equitable proceedings. See, e.g., *Escamilla v. California Ins. Guarantee Ass'n*, supra, 150 Cal.App.3d 53 at 57, 197 Cal.Rptr. 463 at 465.

The Liquidator's Petition for Rehearing also cites *Morgan Stanley Mortgage Capital, Inc. v. Insurance Commissioner*, 18 F.3d 790, 794 (9th Cir. 1994), and *Garamendi v. Executive Life Ins. Co.*, 17 Cal.App.4th 504, 21 Cal.Rptr.2d 578 (1993), for the proposition that the "underlying state court insolvency proceedings . . . are inherently equitable in nature." For the reasons seen above, this observation is irrelevant, because the pertinent inquiry is whether the underlying lawsuit is equitable in nature, not whether the state court liquidation proceedings are legal or equitable. In any event, neither of the cited decisions discusses the proposition for which they are cited by the Liquidator.

off asserted by the reinsurer defendants was a creature of statute, not of equity. In fact, the Court expressly rejected the Commissioner's appeal to "equitable" grounds for disallowing the statutory right of offset:

We do not perceive the issue to be one of . . . judicial favoritism of one group of claimants over another on supposed "equitable" grounds, having nothing to do with the historic concerns of equity jurisprudence in this area. Instead, the issue is one calling for construction of a comprehensive, broadly-phrased statute permitting set-off and admitting no exception for reinsurance relationships.

3 Cal.4th at 1142 (emphasis added).

For the reasons discussed above, the panel correctly ruled that this action is legal rather than equitable in nature, and there is no reason to order rehearing.

B. *Correspondence From Allstate's Counsel Affords No Basis for Rehearing.*

The Liquidator next argues that Allstate is attempting "to interfere with the [state] liquidation proceeding based entirely upon the Decision" in this case. Petition for Rehearing at 5. The sole basis for this remarkable contention is a letter sent by Allstate's counsel on February 9, 1995 to counsel for the Liquidator. Even assuming that the Liquidator's reliance on matters outside the record is permissible,⁴ this letter hardly affords grounds for reconsideration of the panel's decision.

To begin with, the letter in question hardly "interferes" with the Mission insolvency proceedings. Indeed, it is hard to see how a letter from a party's counsel could

⁴ As this Court has held, "[c]onsideration of subsequent factual occurrences is, thus, beyond the scope of a petition for rehearing." *Armster v. United States District Court*, 806 F.2d 1347, 1356-57 (9th Cir. 1986).

ever constitute the kind of interference with state administrative proceedings that is required to raise *Burford* concerns. Simply put, at most the Liquidator has shown that his counsel and Allstate's attorneys disagree regarding the scope of the panel's decision. If rehearing were required on this ground alone, there could scarcely ever be a final decision of this Court.

In any event, counsel's letter does not stake out the purportedly strident positions attributed by the Liquidator to Allstate. The letter merely adopts the non-controversial position that, in light of the panel's decision, the Liquidator's claims against Allstate and Allstate's defenses to those claims are now pending in federal court and not before the Los Angeles Superior Court. The Liquidator apparently contends otherwise, suggesting that the Superior Court will issue a declaration regarding Allstate's right of set-off as an incident to the insolvency proceedings. Petition for Rehearing at 7. Once again, the Liquidator could not be more off the mark.⁵ But the important point for present purposes is that the remote possibility of a dispute in the future over this issue affords no basis for reconsidering the panel's decision now.

C. Recent Decisions Have Not Undermined The Panel's Opinion.

The Liquidator also argues that the panel's decision overlooks recent decisions from the United States Supreme Court and other Circuit Courts establishing that *Burford* abstention is not limited to equitable proceedings. Once again, the Liquidator is simply wrong.

⁵ Any such attempt by the California courts to summarily adjudicate Allstate's right of set-off would be exactly the kind of action prohibited by the *Kinder* decision. See discussion at page 7 above. There is no reason to believe that the Superior Court shares the Liquidator's mistaken belief that such a summary proceeding should be employed.

First, the Liquidator relies on two Supreme Court decisions: *Ankenbrandt v. Richards*, — U.S. —, 112 S. Ct. 2206 (1992), and *Tafflin v. Levitt*, 493 U.S. 455, 110 S. Ct. 792 (1990). The Liquidator argues that, in *Ankenbrandt*, "the Supreme Court had the opportunity to reach the result reached by this Court's Decision, but significantly did not and left the door open for *Burford* abstention in actions law." Petition for Rehearing at 11. In fact, *Ankenbrandt* supports the panel's decision in the present case. There, the Supreme Court held that the domestic relations exception to federal jurisdiction—which "divests the federal courts of power to issue divorce, alimony, and child custody decrees"—had no application in a lawsuit which "in no way seeks to such a decree" but merely seeks to recover monetary damages for alleged child abuse. 112 S. Ct. at 2215. The Court's brief discussion of *Burford* abstention, which comprises a single paragraph of the opinion, tracks the same analysis. The Court concluded that *Burford* abstention was inappropriate because "the status of the domestic relationship" between the parties "has no bearing on the underlying torts alleged." *Id.* at 2216. In other words, the Court reasoned that an action merely to recover money damages threatened no interference with state proceedings to determine such matters as child custody or domestic relations. This observation, of course, is fully consistent with the panel's holding that *Burford* abstention is inappropriate in actions at law for money damages.

Tafflin v. Levitt is even more off the mark. The Liquidator argues that "the Supreme Court affirmed a Fourth Circuit decision which upheld *Burford* abstention in a RICO action for money damages." Petition for Rehearing at 11. The Liquidator overlooks the fact that the Supreme Court's grant of *certiorari* in *Tafflin* was expressly "limited to the question whether state courts have concurrent jurisdiction over civil RICO claims." 493 U.S. at 458, 110 S. Ct. at 794. Thus, the Supreme Court simply did not address the abstention issue.

The Liquidator next argues that the panel inappropriately relied on a Third Circuit decision, *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3rd Cir. 1991). The Liquidator cites two later Third Circuit decisions, *Riley v. Simmons*, F.3d —, 1995 WL 19638 (3rd Cir. Jan. 20, 1995), and *General Glass Indus. Corp. v. Monsour Medical Foundation*, 973 F.2d 197 (3rd Cir. 1992). It is true that the panel in *General Glass* ruled, inconsistently with *University of Maryland*, that *Burford* abstention may apply in legal proceedings. But as both the author of the *Riley v. Simmons* decision and a concurring judge noted, under Internal Operating Procedure 9.1 of the Third Circuit, one panel of that court may not overrule another and “to the extent that the decision of a later panel conflicts with existing circuit precedent, we are bound by the earlier, not the later decision.” *Riley v. Simmons*, 1995 WL 19638 at 16 (Nygaard, J., concurring; quoting *United States v. Monaco*, 23 F.3d 793, 803 (3rd Cir. 1994)); see also *id.* at 9 n. 7 (opinion of the court) (“this panel is bound by the earlier holdings of this Court under Internal Operating Procedure 9.1”).⁶ Thus, *University of Maryland* remains the law in the Third Circuit, establishing that the *Burford* abstention doctrine is inapplicable to purely legal proceedings.

The Liquidator also contends that a recently-decided Second Circuit decision “suggests that the Court’s applica-

⁶ As Judge Nygaard observed, there are two additional flaws in the *General Glass* decision. For one, *General Glass* “did not cite or discuss the clear holding of *Baltimore Bank [for Cooperatives v. Farmers Cheese Cooperative]*, 583 F.2d 104, 111 (3rd Cir. 1978) [that forbids abstention when money damages are sought.” 1995 WL 19638 at 15. Second, as Judge Nygaard noted, the *General Glass* decision relied on *Tafflin v. Levitt*, ignoring—as the Liquidator does here—the fact that “the Court’s grant of *certiorari* in that case was limited solely to whether state courts have concurrent jurisdiction over RICO claims.” 1995 WL 19638. As Judge Nygaard concluded, “*Tafflin* therefore had no precedential value on the issue before the *General Glass* panel.” *Id.*

tion of *Burford* abstention is not limited to cases where a federal court is sitting in equity.” Petition for Rehearing at 13. However, the cited decision—*Sheerbonnett, Ltd. v. American Express Bank, Ltd.*, 17 F.3d 46 (2d Cir. 1994)—suggests nothing of the kind. *Sheerbonnett* did not discuss the question of whether actions of law may be suitable vehicles for *Burford* abstention. The court rejected *Burford* abstention on different grounds, namely that exercising jurisdiction over a damages suit would have no impact on pending state court liquidation proceedings to which the defendant was not even a party. 17 F.3d at 49. While the Second Circuit might alternatively have rejected *Burford* abstention on the basis that the lawsuit before it sought only money damages, the reliance on other grounds hardly demonstrates a conflict with the panel’s decision in this case.⁷

Finally, the Liquidator repeats his earlier argument that “*Burford* abstention is routinely exercised in insurance insolvency cases.” Petition for Rehearing at 8. This may have been true prior to the Supreme Court’s ruling in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 109 S. Ct. 2506 (1989). But as the panel observed, this proposition is far from true now that the Supreme Court has made clear that *Burford* abstention does not apply in actions at law for money damages. Such actions—unlike proceedings in equity in which a federal court stands in judgment over state administrative rulings or proceedings—simply do not present any risk that the federal court will interfere in a

⁷ The Liquidator also complains that the panel relied on a 1993 First Circuit decision, *Fragoso v. Lopez*, 991 F.2d 878, holding that *Burford* abstention is appropriate only in equitable proceedings, while failing “to mention or address the First Circuit’s earlier conflicting decision in *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991).” Petition for Rehearing at 13. The “opinion” in *Gonzalez*, however, is actually a one-paragraph per curiam order granting an unopposed motion to dismiss. This brief order, moreover, does not even discuss the application of *Burford* abstention to actions at law.

matter of state concern. For precisely this reason, as the panel observed, both the First and Third Circuits have rejected *Burford* abstention in such collection actions.⁸

D. *The Panel's Ruling On Appealability Of The Remand Order Here Does Not Create An Intra-Circuit Conflict.*

The Liquidator's final ground for urging rehearing is a purported conflict between the panel's decision and the Court's earlier decision in *Bennett v. Liberty National Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992). The Liquidator's argument is difficult to fathom. The Liquidator seems to be contending that, inconsistent with the panel's ruling, the *Bennett* decision does not permit an appeal from an order of remand based on *Burford* abstention grounds. For good reason, the Liquidator makes this argument only gingerly, stating only that "[t]he reasoning of *Bennett* suggests that the application of abstention, in and of itself, does not constitute a collateral disputed question." Petition for Rehearing at 14.

There is no reason to believe that the panel overlooked the *Bennett* decision, since Allstate brought the decision to the panel's attention pursuant to Rule 28(j), Fed.R.App.P., by letter dated July 22, 1992 and the Liquidator proceeded, in a letter dated August 13, 1992, to discuss the *Bennett* decision at some length.⁹ Nor is there in fact any inconsistency between the ruling in *Bennett* and the panel decision in the present case. *Bennett* authorized an

⁸ See panel opinion at 1432 (citing, *inter alia*, *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993) and *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3rd Cir. 1991).) See also *Kenworthy v. Hargrove*, 826 F.Supp. 138, 141 (E.D. Pa. 1993) ("*Burford* abstention is limited to federal courts sitting in equity.")

⁹ Thereafter, on August 14, 1992, Allstate wrote the 9th Circuit clerk, objecting to the Liquidator's presentation of argument regarding the *Bennett* decision "although Rule 28(j), Fed.R.App.P., expressly prohibits any 'argument' regarding the authorities of which the Court is being advised."

appeal from a remand order on abstention grounds "because the Court's abstention-based remand decided the merits of appellant's arbitration claim." 968 F.2d at 970. *Bennett* did not hold that, in the absence of the ruling on arbitrability, a remand order would have been reviewable only by mandamus. See *id.*

The Liquidator worries that "if the Decision stands, then all district court decisions that remand on grounds of abstention without determination of any substantive issue on the merits are automatically appealable." Petition for Rehearing at 15. Perhaps so, but this will hardly open the floodgates to appellate jurisdiction. After all, the usual order in the case of *Burford* abstention is to dismiss the action; remand is appropriate only when the action got to the Federal Court by way of removal.¹⁰ Indeed, the fact that *Burford* abstention orders typically result in dismissals which are immediately reviewable on appeal is a compelling ground for allowing appeal of remand orders based on *Burford* abstention, which just as effectively reflect a final determination of federal court proceedings.

III.

CONCLUSION

The Liquidator's Petition for Rehearing reflects a series of fundamental errors regarding the governing law. The principal contention advanced by the Liquidator—that this action is equitable in nature—ignores controlling precedents from this very Court and the California Supreme Court. Nor should this case become the first in judicial history to order rehearing based on a post-decision letter from one party's attorney to the other's, lest the Court establish the extraordinary rule that rehearing should be

¹⁰ See generally E. Chemerinsky, FEDERAL JURISDICTION § 12.3 at 612 (1989) (*Burford* abstention "requires the Federal Court to dismiss the case"). This issue was discussed further in Allstate's January 21, 1992 brief in opposition to the Liquidator's motion to dismiss this appeal at pages 14-15.

granted to address the parties' conflicting, subjective views as to the scope of a reported decision. The remaining grounds advanced by the Liquidator are equally without merit, and the Liquidator's Petition for Rehearing should accordingly be denied.

DATED: March 19, 1995

Respectfully submitted,

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By /s/ Joseph D. Lee
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NOV 27 1995

IN THE
Supreme Court of the United States CLERK

OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
 THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
 LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE
 COMPANY TRUST, MISSION NATIONAL INSURANCE
 COMPANY TRUST, ENTERPRISE INSURANCE COMPANY
 TRUST, HOLLAND-AMERICA INSURANCE COMPANY
 TRUST AND MISSION REINSURANCE CORPORATION TRUST,
Petitioner,

v.

ALLSTATE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the
 United States Court of Appeals
 for the Ninth Circuit

BRIEF FOR THE PETITIONER

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64 pp

QUESTIONS PRESENTED

1. Whether the court below erred in holding that a remand order based on abstention is reviewable by appeal under the collateral order doctrine developed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

2. Whether the court below erred in holding that the abstention powers of federal courts are limited to actions in equity, or alternatively, whether that court erred in limiting the exercise of *Burford* abstention solely to actions in equity.

**PARTIES TO THE PROCEEDINGS
AND RULE 29.1 STATEMENT**

The Appellee in the Ninth Circuit, who is the Petitioner here, is Chuck Quackenbush, the Insurance Commissioner of the State of California (statutory successor to John Garamendi) in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, Enterprise Insurance Company Trust, Holland-America Insurance Company Trust, and Mission Reinsurance Corporation Trust.* The Appellant in the Ninth Circuit, and Respondent here, is Allstate Insurance Company.

* Prior to receivership, the parent of Mission Insurance Company was Mission Insurance Group, Inc. ("MIG"). MIG emerged from Chapter 11 bankruptcy as Danielson Holding Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	17
I. THE COURT BELOW ERRED IN PER- MITTING ALLSTATE TO APPEAL THE REMAND ORDER	17
II. THE COURT BELOW ERRED IN REVERS- ING THE REMAND ORDER ON THE GROUNDS THAT THE DISTRICT COURT HAD NO DISCRETION TO ABSTAIN IN A CASE INVOLVING AN ACTION AT LAW....	19
ARGUMENT	21
I. THE COURT BELOW ERRED IN PER- MITTING ALLSTATE TO APPEAL THE REMAND ORDER	21
II. THE COURT BELOW ERRED IN REVERS- ING THE REMAND ORDER ON THE GROUNDS THAT THE DISTRICT COURT HAD NO DISCRETION TO ABSTAIN IN A CASE INVOLVING AN ACTION AT LAW....	31
A. The Court Should Not Restrict Abstention Doctrines On The Basis Of The Equity/Law Distinction	31

TABLE OF CONTENTS—Continued

	Page
1. Such A Rule Would Be Inconsistent With Modern Procedure	33
2. Such A Rule Denies The District Court Its Proper Authority	34
3. This Court Has Not Limited Abstention Doctrines To Equity Suits, Nor Should It	35
4. Abstention Should Be Viewed As An Exercise Of The Equity Aspect Of The Court's Merged Jurisdiction	40
5. This Court Has Previously Recognized An Abstention-Like Doctrine In Insurance And Thrift Insolvencies, Based Upon An Analysis Consistent With The Commissioner's Contentions	43
B. The Ninth Circuit Rule Would Undermine Principles Of Federalism	45
1. The Abstention Doctrine Should Facilitate The Regulation Of Insurance By The States To Which Congress Has Deferred	45
2. The Ninth Circuit Rule Would Create A Rift In The Application Of Federalism Principles	46
3. The Abstention Doctrines Promote Federalism	47
4. Application Of The Ninth Circuit Rule In The Instant Case Is Disruptive Of Important State Interests And Interferes With California's Statutory Scheme	48
CONCLUSION	50

TABLE OF AUTHORITIES

CASES	Page
<i>20th Century Ins. Co. v. Garamendi</i> , 8 Cal. 4th 216, 878 P.2d 566, 32 Cal. Rptr. 2d 807 (1994), <i>cert. denied</i> , 115 S. Ct. 1106 (1995)	3
<i>Aims Enters. Inc. v. Muir</i> , 609 F. Supp. 257 (M.D. Pa. 1985)	15
<i>Alabama Pub. Serv. Comm'n v. Southern R. Co.</i> , 341 U.S. 341 (1951)	37
<i>Alpha Beta Food Mkts., Inc. v. Retail Clerks Union</i> , 45 Cal. 2d 764, 291 P.2d 433 (1955)	49
<i>Anderson v. Great Republic Life Ins. Co.</i> , 41 Cal. App. 2d 181, 106 P.2d 75 (1940)	3, 4
<i>Ankenbrandt v. Richards</i> , 504 U.S. 689 (1992)	38, 39
<i>Atlas Life Ins. Co. v. W.J. Southern, Inc.</i> , 306 U.S. 563 (1939)	34, 35
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	20, 41
<i>Baldwin-United Corp. v. Garner</i> , 283 Ark. 385, 678 S.W.2d 754 (1984), <i>cert. denied</i> , 471 U.S. 1111 (1985)	46
<i>Barnhardt Marine Ins., Inc. v. New England Int'l Sur., Inc.</i> , 961 F.2d 529 (5th Cir. 1992)	15
<i>Bellotti v. Baird</i> , 428 U.S. 132 (1976)	34
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943)	passim
<i>California State Auto. Ass'n Inter-Ins. Bureau v. Maloney</i> , 341 U.S. 105 (1951)	4, 45, 49
<i>Capitol Indem. Corp. v. Curiale</i> , 871 F. Supp. 205 (S.D.N.Y. 1994)	15
<i>Carpenter v. Pacific Mut. Life Ins. Co.</i> , 10 Cal. 2d 307, 74 P.2d 761 (1937), <i>aff'd sub nom. Neblett v. Carpenter</i> , 305 U.S. 297 (1938)	3, 4
<i>Clay v. Sun Ins. Office, Ltd.</i> , 363 U.S. 207 (1960)	19, 20, 36, 38
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949)	passim
<i>Colonial Am. Life Ins. Co. v. Commissioner</i> , 491 U.S. 244 (1989)	11
<i>Colorado River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976)	15, 47
<i>Commercial Nat'l Bank v. Superior Court</i> , 14 Cal. App. 4th 393, 17 Cal. Rptr. 2d 884 (1993)	4
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463 (1978)	19, 23, 26, 27

TABLE OF AUTHORITIES—Continued

	Page
<i>Corcoran v. Ardra Ins. Co., Ltd.</i> , 657 F. Supp. 1223 (S.D.N.Y. 1987)	49
<i>Corcoran v. Ardra Ins. Co., Ltd.</i> , 842 F.2d 31 (2nd Cir. 1988)	6, 12, 15, 22
<i>Corcoran v. Universal Reinsurance Corp.</i> , 713 F. Supp. 77 (S.D.N.Y. 1989)	13
<i>Culbertson v. Cizek</i> , 225 Cal. App. 2d 451, 37 Cal. Rptr. 548 (1964)	7
<i>Digital Equip. Corp. v. Desktop Direct</i> , 511 U.S. —, 114 S. Ct. 1992 (1994)	passim
<i>Doughty v. Underwriters At Lloyds, London</i> , 6 F.3d 856 (1st Cir. 1993)	passim
<i>In the Matter of Equity Funding Corp.</i> , 396 F. Supp. 1266 (C.D. Cal. 1975)	46
<i>In re Executive Life Ins. Co.</i> , 32 Cal. App. 4th 344, 38 Cal. Rptr. 2d 453, rev. denied (1995)	7, 48
<i>Executive Software N. Am. v. United States Dist. Court</i> , 24 F.3d 1545 (9th Cir. 1994)	22
<i>Fair Assessment in Real Estate Ass'n v. McNary</i> , 454 U.S. 100 (1981)	passim
<i>Farmer's Loan & Trust Co. v. Lake S.E.R. Co.</i> , 177 U.S. 51 (1900)	8
<i>Fornaris v. Ridge Tool Co.</i> , 400 U.S. 41 (1970)	19, 36
<i>Foster v. Chesapeake Ins. Co., Ltd.</i> , 933 F.2d 1207 (3rd Cir. 1991)	13
<i>Garamendi v. Mission Ins. Co. (Carboline)</i> , 15 Cal. App. 4th 1277, 19 Cal. Rptr. 2d 190, rev. denied (1993)	6
<i>Garcia v. Island Program Designer</i> , 4 F.3d 57 (1st Cir. 1993)	29
<i>Garris v. Carpenter</i> , 33 Cal. App. 2d 649, 92 P.2d 688 (1939)	7
<i>General Glass Indus. Corp. v. Monsour Medical Found.</i> , 973 F.2d 197 (3rd Cir. 1992)	31
<i>German Alliance Ins. Co. v. Lewis</i> , 233 U.S. 389 (1914)	4, 45, 46
<i>Gordon v. Washington</i> , 295 U.S. 30 (1935)	44
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	42
<i>Grimes v. Crown Life Ins. Co.</i> , 857 F.2d 699 (10th Cir. 1988), cert. denied, 489 U.S. 1096 (1989)	13, 15

TABLE OF AUTHORITIES—Continued

	Page
<i>Gulfstream Aerospace Corp. v. Mayacamas Corp.</i> , 485 U.S. 271 (1988)	23, 27, 32, 34
<i>Hartford Cas. Inc. Co. v. Borg-Warner Corp.</i> , 913 F.2d 419 (7th Cir. 1990)	15
<i>In re Integrity</i> , 573 A.2d 928, 240 N.J. Super. 480 (Super. Ct. 1990)	48
<i>Lac D' Amiante du Quebec, Ltee v. American Home Assurance Co.</i> , 864 F.2d 1033 (3rd Cir. 1988)	15
<i>Langnes v. Green</i> , 282 U.S. 531 (1931)	20, 37, 40
<i>Lauro Lines s.r.l. v. Chasser</i> , 490 U.S. 495 (1989)	passim
<i>Law Enforcement Ins. Co. v. Corcoran</i> , 807 F.2d 38 (2nd Cir. 1986), cert. denied, 481 U.S. 1017 (1987)	15
<i>Lion Bonding & Sur. Co. v. Karatz</i> , 262 U.S. 77 (1923)	4, 48
<i>Louisiana Power & Light Co. v. Thibodaux</i> , 360 U.S. 25 (1959)	19, 37, 38, 39
<i>Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.</i> , 910 F.2d 249 (5th Cir. 1990)	15
<i>Mathias v. Lennon</i> , 474 F. Supp. 949 (S.D.N.Y. 1979)	15
<i>Metropolitan Life Ins. Co. v. Board of Directors of Wisconsin Ins. Sec. Fund</i> , 572 F. Supp. 460 (W.D. Wis. 1983)	15
<i>Miller-Davis Co. v. Illinois State Toll Highway Auth.</i> , 567 F.2d 323 (1977)	37
<i>Minot v. Eckardt-Minot</i> , 13 F.3d 590 (2nd Cir. 1994)	22
<i>Mondrus v. Mutual Ben. Life Ins. Co.</i> , 775 F. Supp. 1155 (N.D. Ill. 1991)	15
<i>Montrose Chemical Corp. v. Admiral Ins. Co.</i> , 10 Cal. 4th 645, 897 P.2d 1, 42 Cal. Rptr. 2d 324 (1995)	9
<i>Moore v. Sims</i> , 442 U.S. 415 (1970)	38
<i>Morgan Stanley Mortgage Capital v. Insurance Comm'r</i> , 18 F.3d 790 (1994)	35
<i>Moses H. Cone Memorial Hospital v. Mercury Construction Corp.</i> , 460 U.S. 1 (1983)	17, 22, 25
<i>New Orleans Pub. Serv. Inc. v. Council of New Orleans</i> , 491 U.S. 350 (1989)	16, 41, 47
<i>Osborn v. Ozlin</i> , 310 U.S. 53 (1940)	4, 45, 49

TABLE OF AUTHORITIES—Continued

	Page
<i>Pelleport Investors, Inc. v. Budco Quality Theatres</i> , 741 F.2d 273 (9th Cir. 1984)	22, 30
<i>Penn Gen. Casualty Co. v. Pennsylvania</i> , 294 U.S. 189 (1935)	4, 20, 43, 48
<i>Pennsylvania v. Williams</i> , 294 U.S. 176 (1935)	20, 35, 38, 44
<i>Princess Lida v. Thompson</i> , 305 U.S. 456 (1939)	4, 48
<i>Prudential Reinsurance Co. v. Superior Court</i> , 216 Cal. App. 3d 1321, 265 Cal. Rptr. 386 (1989)	6
<i>Prudential Reinsurance Co. v. Superior Court</i> (<i>Garamendi</i>), 3 Cal. 4th 1118, 842 P.2d 48, 14 Cal. Rptr. 2d 749 (1992)	passim
<i>Railroad Comm'n of Texas v. Pullman Co.</i> , 312 U.S. 496 (1941)	43
<i>Ralphs Grocery Co. v. Reimel</i> , 69 Cal. 2d 172, 444 P.2d 79, 70 Cal. Rptr. 407 (1968)	12
<i>Richardson-Merrell Inc. v. Koller</i> , 472 U.S. 424 (1985)	28, 29
<i>Ross v. Bernhard</i> , 396 U.S. 531 (1970)	19, 33
<i>Sabato v. Florida Dept. of Ins.</i> , 768 F. Supp. 1562 (S.D. Fla. 1991)	15
<i>Thermtron Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336 (1976)	17, 18, 21
<i>Travelers Ins. Co. v. Keeling</i> , 996 F.2d 1485 (2nd Cir. 1993)	22
<i>Underwriters Nat'l Assurance Co. v. North Caro- lina Life & Acc. & Health Ins. Guar. Ass'n</i> , 455 U.S. 691 (1982)	8
<i>United Gas Pipe Line Co. v. Ideal Cement Co.</i> , 369 U.S. 134 (1962)	19, 36
<i>United States Dept. of Treasury v. Fabe</i> , 508 U.S. —, 113 S. Ct. 2202 (1993)	45, 46
<i>United States v. Bank of New York & Trust Co.</i> , 296 U.S. 463 (1936)	4, 7, 8, 44, 48
<i>United States v. Lopez</i> , 514 U.S. —, 115 S. Ct. 1624 (1995)	42
<i>United States v. South-Eastern Underwriters</i> <i>Ass'n</i> , 322 U.S. 533 (1944)	45, 47, 48
<i>Westerholm v. 20th Century Ins. Co.</i> , 58 Cal. App. 3d 628, 130 Cal. Rptr. 164 (1976)	7
<i>Wolfson v. Mutual Benefit Life Ins. Co.</i> , 51 F.3d 141 (8th Cir. 1995)	31

TABLE OF AUTHORITIES—Continued

	Page
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	15
STATUTES	
U.S. CONST. amend. VII	34
11 U.S.C. § 109(b) (2)	4, 44, 46
11 U.S.C. § 109(d)	4, 46
15 U.S.C. § 1011	46
15 U.S.C. §§ 1011-1015	2, 4
15 U.S.C. § 1012(b)	46
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(b)	18
28 U.S.C. § 1332(a)	2
28 U.S.C. § 1441	14
28 U.S.C. § 1441(a)	2
28 U.S.C. § 1447(c)	2
28 U.S.C. § 1447(d)	2, 16, 18, 29
31 U.S.C. § 3713	46
42 U.S.C. § 1983	32
Cal. Code Civ. Proc. § 410.50(a)	7
Cal. Ins. Code § 900	9
Cal. Ins. Code § 900-900.2	2
Cal. Ins. Code § 900.9	2
Cal. Ins. Code §§ 903-903.5	2
Cal. Ins. Code §§ 905-911	2
Cal. Ins. Code § 907	11
Cal. Ins. Code § 922.1	11
Cal. Ins. Code §§ 922.1-922.8	9
Cal. Ins. Code §§ 922.1-923.5	2
Cal. Ins. Code § 922.2	11, 49
Cal. Ins. Code § 922.4	11
Cal. Ins. Code § 922.5	11
Cal. Ins. Code § 922.8	11
Cal. Ins. Code § 922.15	11
Cal. Ins. Code § 923	9
Cal. Ins. Code § 923.5	9
Cal. Ins. Code § 925	2
Cal. Ins. Code § 925.2	2
Cal. Ins. Code § 925.4	2
Cal. Ins. Code §§ 1010-1042	2
Cal. Ins. Code §§ 1010-1062	11

TABLE OF AUTHORITIES—Continued

	Page
Cal. Ins. Code § 1011	3, 4
Cal. Ins. Code § 1016	3, 4
Cal. Ins. Code § 1017	4
Cal. Ins. Code § 1020	9
Cal. Ins. Code § 1021	7
Cal. Ins. Code § 1031	15
Cal. Ins. Code § 1032	7
Cal. Ins. Code § 1033	7
Cal. Ins. Code § 1035.5	7
Cal. Ins. Code § 1037	7
Cal. Ins. Code § 1037 (c)	7
Cal. Ins. Code §§ 1056.5-1064.12	2
Cal. Ins. Code § 1057	3
Cal. Ins. Code § 1058	9
Cal. Ins. Code § 1059	3
Cal. Ins. Code § 1064.1-1064.12	11
Cal. Ins. Code § 1064.2(b)	4
RULES	
FED. R. CIV. PROC. 2	2, 33
FED. R. CIV. PROC. 8(e) (2)	2, 33
FED. R. CIV. PROC. 18	2, 34
FED. R. CIV. PROC. 54(c)	2, 34
OTHER AUTHORITIES	
The Federalist Nos. 80, 83 (Alexander Hamilton) ..	35
Barrons, Dictionary of Insurance Terms 281 (1987)	10
Dan Dobbs, <i>Dobbs Law Of Remedies</i> (2d ed. 1993)	19
David Shapiro, <i>Jurisdiction and Discretion</i> 60 N.Y.U. L. Rev. 543 (1985)	41, 42
Michael Solimine, <i>Removal, Remands, and Reform- ing Federal Appellate Review</i> , 58 Mo. L. Rev. 287 (1993)	30
Gordon Young, <i>Federal Court Abstention and State Administrative Law from Buford to Akenbrandt: Fifty Years of Judicial Federalism Under Buford v. Sun Oil Co., and Kindred Doc- trines</i> , 42 DePaul L. Rev. 859 (1993)	47

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-244

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE
COMPANY TRUST, MISSION NATIONAL INSURANCE
COMPANY TRUST, ENTERPRISE INSURANCE COMPANY
TRUST, HOLLAND-AMERICA INSURANCE COMPANY
TRUST AND MISSION REINSURANCE CORPORATION TRUST,
Petitioner,

v.

ALLSTATE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 47 F.3d 350. The unpublished order of the district court granting abstention under the *Burford* doctrine is reproduced in Pet. App. B. The unpublished order of the court of appeals denying the petition for rehearing is reproduced in Pet. App. C.

JURISDICTION

The opinion of the court of appeals was entered on February 2, 1995. A timely petition for rehearing with

a suggestion for rehearing *en banc* was denied on May 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the pertinent provisions of the McCarran-Ferguson Act, codified at 15 U.S.C. §§ 1011-1015, the pertinent provisions of the California Insurance Code, codified at Cal. Ins. Code §§ 900-900.2, 900.9, 903-903.5, 905-911, 922.1-923.5, 925, 925.2, 925.4, 1010-1042, 1056.5-1064.12 (Pet. App. D), Federal Rules of Civil Procedure 2, 8(e)(2), 18 and 54(c) (Br. App. A),¹ codified at Title 28, United States Code, and the pertinent provisions of the Judiciary Act, codified at 28 U.S.C. §§ 1332(a), 1441(a),(c) (Pet. App. D) and 1447(c), (d), (Resp. App. 2).

STATEMENT OF THE CASE

1. The Mission Companies² are property casualty insurers in liquidation proceedings in California state court. Petitioner, the Insurance Commissioner of the State of California (the "Commissioner")³ is the court-appointed liquidator. Respondent Allstate Insurance Company ("Allstate") is a reinsurer of the Mission Companies and was also a reinsured of Mission Insurance Company.⁴ The particular case before this Court is best understood if it is first placed in the context of the larger proceedings

¹ All references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless stated otherwise.

² Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company and Mission Reinsurance Corporation (the "Mission Companies").

³ There have been four Commissioners in charge of these proceedings: Commissioner Bruce Bunner, Commissioner Roxani Gillespie, Commissioner John Garamendi, and Commissioner Chuck Quackenbush. Unless there is a reason to do so, this brief will not distinguish the successive Commissioners and will simply refer to the "Commissioner."

⁴ See note 17 *infra*.

of which it is an essential part. This larger context is discussed in paragraphs 2-16, below, and the details of this case and its specific procedural history are described beginning at paragraph 17 of this Statement.

2. The Mission Companies were placed into California state court conservation proceedings in 1985 (the "Receivership Proceedings"). Vigorous efforts toward rehabilitation ultimately failed, primarily due to the refusal of the Mission Companies' reinsurers to pay the sums due (the "Reinsurance Recoverables") on various reinsurance arrangements. The conservation proceedings were, therefore, converted into liquidation proceedings on February 24, 1987.⁵ This was the largest insurance insolvency in United States history up to that time and involved policyholders in all 50 states.⁶

3. California, like all states, has a comprehensive statutory scheme for insurance insolvency matters. The California statutes require that the Commissioner be appointed conservator or liquidator of insolvent insurers, Cal. Ins. Code §§ 1011, 1016, and in that capacity, the Commissioner acts as receiver and trustee. Cal. Ins. Code § 1057; *Anderson v. Great Republic Life Ins. Co.*, 41 Cal. App. 2d 181, 188, 106 P.2d 75, 79 (1940). As receiver, the Commissioner is not simply a common law receiver, but acts in his official capacity as an officer of the state, and is the embodiment of the state's police power in the insurance insolvency context. Cal. Ins. Code §§ 1011, 1059; *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 240, 878 P.2d 566, 580, 32 Cal. Rptr. 2d 807, 821 (1994), *cert. denied*, 115 S. Ct. 1106 (1995); *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal. 2d 307, 329, 74 P.2d 761, 774-75 (1937), *aff'd sub nom. Neblett*

⁵ Pet. App. E p. 119a-121a, Jt. App. p. 23-34.

⁶ MIG, the ultimate corporate holding company, and several non-insurance affiliates were placed into federal bankruptcy proceedings. Although proceedings have occurred in both courts, the bankruptcy court and the Superior Court of the State of California, County of Los Angeles (the "Receivership Court") have completely avoided any jurisdictional conflict.

v. Carpenter, 305 U.S. 297 (1938). At the commencement of insolvency proceedings, title to all assets of the insurer, including all accounts receivable, is vested, by operation of law, in the Commissioner in his official capacity. See *Carpenter*, 10 Cal. 2d at 329, 74 P.2d at 774-75; *Commercial Nat'l Bank v. Superior Court*, 14 Cal. App. 4th 393, 398, 17 Cal. Rptr. 2d 884, 886 (1993); Cal. Ins. Code §§ 1011, 1064.2(b). The underlying proceedings are *in rem* or, alternatively, *quasi in rem*. *Lion Bonding & Sur. Co. v. Karatz*, 262 U.S. 77 (1923); *Penn Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935); *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936); *Princess Lida v. Thompson*, 305 U.S. 456 (1939).

4. California's integrated statutory plan treats the conservation and liquidation of insurers as a single special proceeding before a single court.⁷ A conservation proceeding seeks to preserve and rehabilitate the insurer. If such efforts fail, the proceeding is converted to a liquidation proceeding before the same court.⁸ The Commissioner exercises substantial discretion, under the auspices of the state court, in conducting insurance insolvency proceedings. The vital public interest is involved.⁹ The insurance industry is a traditional state enclave, and Congress has mandated that it will remain a state enclave, both by its enactment of the McCarran-Ferguson Act¹⁰ and by its exemption of insurance companies from the Federal Bankruptcy Act.¹¹

⁷ Under California law, insurance insolvency proceedings are "special proceedings." *Carpenter*, 10 Cal. 2d at 327, 74 P.2d at 773; *Anderson*, 41 Cal. App. 2d at 188-89, 106 P.2d at 79.

⁸ See Cal. Ins. Code §§ 1016, 1017.

⁹ *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914); *Osborn v. Ozlin*, 310 U.S. 53 (1940); *California State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105 (1951).

¹⁰ 15 U.S.C. §§ 1011-1015.

¹¹ 11 U.S.C. § 109(b)(2), (d). By exempting insurance insolvencies from federal bankruptcy, Congress deferred to established state processes.

5. The issues in the Receivership Proceedings and in related litigation are intimately connected with California's public policy. For example, the dispute with Allstate requires the interpretation of various reinsurance agreements between the insolvent Mission Companies and Allstate on the one hand, and Mission Insurance Company ("MIC") and Allstate's affiliate Northbrook Excess and Surplus Company ("Northbrook") on the other hand. Allstate reinsured various Mission Companies under certain reinsurance contracts and was reinsured by MIC under separate contracts. Northbrook was reinsured by MIC on still other contracts, but did not reinsure MIC. Allstate seeks to combine sums due to it with sums due to Northbrook and set the total off against the amount Allstate owes to MIC. Northbrook owes nothing to MIC, therefore, it has nothing against which to set off its credit. The Commissioner has determined this combination is impermissible under the statutes and under California law. Allstate also asserts the right to arbitrate the dispute pursuant to clauses in some, but not all, of the agreements. Whether arbitration is available post-liquidation is an unsettled question under California law. The application of the arbitration clause is further complicated, post-liquidation, by the "insolvency clause"¹² contained in the contracts and by the statutory claims process. These issues are also unsettled under California law. Similar disputes exist with other reinsurers.¹³ These issues transcend the instant dispute and impact core aspects of the liquidation proceedings and all other Cali-

¹² Jt. App. p. 109-110.

¹³ See, e.g., a March 8, 1994 Order of the Receivership Court (Jt. App. p. 165-166) regarding reinsurance offset rights and the proper interpretation of the decision in *Prudential Reinsurance Co. v. Superior Court (Garamendi)*, 3 Cal. 4th 1118, 842 P.2d 48, 14 Cal. Rptr. 2d 749 (1992) [hereinafter *Prudential*], which order was appealed and is now pending in the case titled *Imperial Casualty and Indemnity Co. v. Insurance Commissioner of the State of California*, California Court of Appeal, Second Appellate District, Case No. B083725 [hereinafter *ICIC*].

California insurance insolvencies with similar circumstances.¹⁴ Related litigation that has occurred in the Receivership Proceedings has resulted in decisions by the California Courts of Appeal¹⁵ and the California Supreme Court.¹⁶ In *Prudential*, the California Supreme Court rendered a 4-3 opinion involving the highly disputed and complex issue of when, under California statutory law, a reinsurer may set off claims against the insolvent from the reinsurance recoverables. The determination was that certain offsets (to which the parties now refer as "group-to-group") are not permitted, but that others (to which the parties now refer as "company-to-company") are permissible. Allstate's offset claims involve the correct application and interpretation of the *Prudential* decision. The underlying suit is not a run-of-the-mill contract dispute or collection action. The issues involved require a comprehensive resolution which considers California's statutory scheme and applies the state's public policy.

6. The Commissioner must receive and determine many thousands of claims (including those of Allstate)¹⁷

¹⁴ See, e.g., *Doughty v. Underwriters At Lloyd's, London*, 6 F.3d 856, 858, 866 (1st Cir. 1993), where the First Circuit affirmed the remand of a dispute very similar to the instant case, which also left open the arbitration issue. That court referred to the merits of that case as "a veritable hothouse of efflorescent questions" which it left to the state forum. See also, *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31, 37 (2nd Cir. 1988).

¹⁵ *Prudential Reinsurance Co. v. Superior Court*, 216 Cal. App. 3d 1321, 265 Cal. Rptr. 386 (1989); *Garamendi v. Mission Ins. Co. (Carboline)*, 15 Cal. App. 4th 1277, 19 Cal. Rptr. 2d 190, rev. denied (1993); *ICIC* (pending).

¹⁶ *Prudential*, 3 Cal. 4th 1118.

¹⁷ Allstate's claims filed in the Receivership Proceedings assert the same issues it now seeks to assert in the underlying dispute. Allstate entered into approximately 15 reinsurance treaties and numerous facultative certificates pursuant to which Allstate reinsured one or more of the Mission Companies and balances are due thereunder. Allstate was, in turn, reinsured by MIC under approximately 14 different treaties. In addition, Northbrook, an Allstate affiliate, was reinsured by MIC under approximately 8 completely

which have been filed in the Receivership Proceedings pursuant to state statutes. See, e.g., Cal. Ins. Code §§ 1021, 1032, 1037(c). The Commissioner must also protect, marshal, and eventually liquidate the assets of the Mission Companies. The Commissioner must adjudicate claims under California's claims statutes and distribute the assets under California's priority statutes. Cal. Ins. Code §§ 1033, 1035.5. These are key functions of the Commissioner under the state statutory plan, and the Commissioner is given wide discretion and authority in this regard. See, e.g., Cal. Ins. Code § 1037; *Garris v. Carpenter*, 33 Cal. App. 2d 649, 92 P.2d 688, 692 (1939); *In re Executive Life Ins. Co.*, 32 Cal. App. 4th 344, 38 Cal. Rptr. 2d 453, rev. denied (1995). The marshaling and control of the insurer's assets is particularly important in the case of property and casualty companies, such as the Mission Companies, because the large majority of a property and casualty insurer's assets are normally held in the form of accounts receivable.¹⁸

different reinsurance agreements. In 1987, Allstate filed several claims in the Receivership Proceedings, seeking to combine all of these various relationships for offset purposes (Jt. App. p. 151-164). By the filing of these proofs of claim, Allstate subjected itself to the *in personam* jurisdiction of the Receivership Court, even assuming *arguendo* that it was not already subject to the Receivership Court's jurisdiction. See Cal. Code Civ. Proc. § 410.50(a). The underlying suit includes actions at law under the reinsurance arrangements, but it also involves a declaratory judgment action by the Commissioner, as well as offset claims by Allstate. (Jt. App. p. 35-61). Under California law, a declaratory judgment action is equitable in nature, *Westerholm v. 20th Century Ins. Co.*, 58 Cal. App. 3d 628, 632, 130 Cal. Rptr. 164, 166 n.1 (1976); *Culbertson v. Cizek*, 225 Cal. App. 2d 451, 462, 37 Cal. Rptr. 548, 553 (1964), and the claims for offset are actions "in equity." *Prudential*, 3 Cal. 4th at 1124, 842 P.2d at 50-51, 14 Cal. Rptr. at 751-52.

¹⁸ This Court recognized the importance of permitting such control in *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477 (1936) where, in speaking of state court receivership proceedings it said: "In both these cases the proceedings in the state court were *quasi in rem*. Control of the funds was essential

That is true in this case as to the Reinsurance Recoverables.

7. The Receivership Court has, continuously assumed and expressly exercised sole and exclusive jurisdiction over all assets of the Mission Companies "of any kind or nature however and wherever situated, to the exclusion of all other courts."¹⁹ The Receivership Court also issued injunctions forbidding interference with the Commissioner or the proceedings, the institution or prosecution of any actions or proceedings against the insurers or their assets or against the receiver, except after obtaining permission from the Receivership Court. These

to the exercise of the court's jurisdiction to protect the rights of claimants. . . . The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized . . . [i]t applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property." (emphasis added) (citing *Farmer's Loan & Trust Co. v. Lake S.E.R. Co.*, 177 U.S. 51, 61 (1900)).

¹⁹ The Orders Appointing Conservator (October 31, 1985, Pet. App. E and November 26, 1985, Jt. App. p. 8-22), and Liquidator (February 24, 1987, Pet. App. E p. 119a-121a and Jt. App. p. 23-34), the Supplemental Order Appointing Liquidator and Restraining Order (March 5, 1987, Pet. App. E p. 122a-126a), the Final Order of Rehabilitation (April 25, 1990, Jt. App. p. 64-72), the Order Approving Insurance Commissioner's Final Liquidation Dividend Plan, Establishing Final Claims Bar Date for Contingent, Unliquidated and/or Undetermined Claims and Related Orders and Setting Hearing Date (December 28, 1994, Jt. App. p. 135-142), all reiterate the Receivership Court's assumption of sole and exclusive jurisdiction. With the exception of the Order Approving Final Liquidation Dividend Plan, these orders are all final and have not been challenged at any level. Allstate may not now complain about provisions of orders of which it had notice and failed to seek review. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 703-10 (1982) [hereinafter *UNAC*].

injunctions also prohibit the obtaining of preferences, judgments, attachments or liens against the assets.²⁰

8. Reinsurance Recoverables occupy a special place under the California Insurance Code and that of all other states. Efficacious reinsurance is of special importance in the property and casualty insurance business because of the solvency requirements and financial accounting provisions of California insurance law and that of other states. Under the statutes, insurers must meet certain financial standards and maintain certain capital and surplus in order to issue policies to the public.²¹ Each policy issued assumes liabilities against which the insurer must reserve. This increase in reserves creates a resulting decrease in capital and surplus. Thus, in the normal course of business, the more risk an insurer places on the books, the more strain there is upon its surplus. Because of this, insurers, particularly those who underwrite "long tail" liabilities,²² would eventually be unable to issue new policies unless they acquired further capital and surplus. Reinsurance, however, permits them to do so. See Cal. Ins. Code §§ 922.1-922.8.

9. Reinsurance is the insurance of insurance companies. A typical property and casualty insurer, such as one

²⁰ These injunctions are contained in the conservation and liquidation orders and are expressly authorized by Cal. Ins. Code § 1020 (Pet. App. D). Cal. Ins. Code § 1058 gives the Receivership Court the jurisdiction to "hear and determine in such proceeding, all actions or proceedings then pending or thereafter instituted by or against" the insolvent. Under *UNAC*, these valid, subsisting and binding orders of the Receivership Court are entitled to full faith and credit and comity.

²¹ See, e.g., Cal. Ins. Code §§ 900, 923 and 923.5. Pet. App. D.

²² For example, liability for long term risks and harm resulting from asbestosis, hazardous waste, construction defects, bodily injury, breast implants, toxic shock syndrome, agent orange, environmental pollution, DES, heart valve, PVC pipe, Dalcon Shield, repetitive task syndrome and other kinds of risks were assumed by the Mission Companies. In fact, the recent California Supreme Court decision in *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 897 P.2d 1, 42 Cal. Rptr. 2d 324 (1995) recognized a "continuous trigger" for such exposures which will impact the Mission Companies' liabilities and that of Allstate.

of the Mission Companies, might have general commercial liability policies with exposure to liabilities running in the hundreds of millions of dollars. Rather than retaining this entire risk, the company reinsures or "lays off" a portion of this liability to other companies. In this manner an insurer might, for example, issue a \$20 Million umbrella liability policy, but retain only the first \$200,000 of exposure and reinsure the remaining liabilities through various reinsurance agreements.²³ If the original insured paid, for example, a \$500,000 premium to MIC for a policy, that premium would be allocated among MIC and its reinsurers in accordance with the reinsurance agreements. In an example such as the one outlined, the reinsurers themselves frequently involve other reinsurers either through "retrocessions"²⁴ or through various other kinds of arrangements such as stop loss or catastrophe covers. The reinsurance market is international, as can be seen from the various countries in which the Mission Companies' insurers reside,²⁵ and the original premium is quickly spread over many companies in many states and foreign countries.

10. In normal practice, when a policyholder suffers a covered loss, the original insurer pays the full claim and recovers from the reinsurers their share of the liability.

²³ If, for example, MIC issued a \$20 Million umbrella liability policy, a structure such as the following might result from reinsurance arrangements:

<i>Level of exposure</i>	<i>Company</i>
1st layer of \$200,000	MIC
2nd layer from \$201,000 to \$500,000	Reinsurer A
3rd layer from \$500,001 to \$1 Million	Reinsurer B
4th layer from \$1 Million and \$1 to \$5 Million	Reinsurer C
5th layer from \$5 Million and \$1 to \$20 Million	Reinsurer D

²⁴ "Retrocession" may be defined as reinsurance of a reinsurer's obligations. Barrons, Dictionary of Insurance Terms 281 (1987).

²⁵ Argentina, Belgium, Bermuda, Brazil, China, Denmark, Egypt, England, Finland, France, Germany, India, Ireland, Israel, Italy, Japan, Korea, Kuwait, Monte Carlo, the Netherlands, New Zealand, Norway, Singapore, Spain, Sweden, Switzerland, United States, and Venezuela, among others.

The original insurer remains fully liable to the insured for the *entire* loss unless there is some contract provision to the contrary. Such "cut through" provisions are very rare and, normally, the original carrier remains 100% liable to the insured even if it lays off 90% of the risk and pays out 90% of the premium to reinsurers. Significantly, the original insured has no say in, nor necessarily even any notice of, these reinsurance arrangements. Since a policyholder has no cause of action directly against a reinsurer, upon insolvency of the original insurer, *only* the Commissioner, as receiver, can sue the reinsurer to obtain the Reinsurance Recoverables. *Prudential*, 3 Cal. 4th at 1126, 842 P.2d at 52, 14 Cal. Rptr. 2d at 753; *Colonial Am. Life Ins. Co. v. Commissioner*, 491 U.S. 244, 246 (1989); See also, Cal. Ins. Code § 922.2.

11. In addition to spreading the risk under the original policy, reinsurance has a salutary and momentous effect upon the insurers' financial statements because the Reinsurance Recoverables may be used, depending on the applicable statute, either as credits or as deductions from liabilities on the insurers' financial statements.²⁶ In either event, the result is effectively a dollar for dollar increase in the insurers' capital and surplus.²⁷ This increase in capital and surplus permits the insurer to issue additional policies to the public. More reinsurance permits still further surplus relief and the issuance of more policies to the public. All the while, more and more premium money is spread among more and more reinsurers in dozens or even hundreds of jurisdictions. The insurance-buying public is dependent upon a far-flung reinsurance web which is, in most cases, completely unknown to the general public.²⁸

²⁶ Accounts receivable, including reinsurance recoverables, are assets of the insurer. See Cal. Ins. Code §§ 907, 922.8, 1010-1062, 1064.1-1064.12, Pet. App. D.

²⁷ Cal. Ins. Code §§ 922.1, 922.15, 922.2, 922.4, 922.5. Pet. App. D.

²⁸ The entire structure is a house of cards if the original insurer becomes insolvent and the reinsurers cannot be required to pay.

12. Other than actual paid in capital, the primary source for the surplus required to engage in the business of property and casualty insurance is the financial credit booked *because of* the Reinsurance Recoverables. Thus, the nature of, the security for, the accounting for, and the payment of Reinsurance Recoverables are all matters of vital importance to California and the Commissioner in the oversight and regulation of the insurers doing business in California. The Commissioner has broad discretion to adopt rules and regulations to promote the public welfare, and the Commissioner's interpretation of the California insurance statutes is entitled to great deference.²⁹

13. The Mission Companies had issued insurance policies to several hundred thousand policyholders in all 50 states and thereby became primarily liable for many billions of dollars in both property and casualty insurance liabilities.³⁰ Despite this primary liability, the Mission Companies paid many millions of dollars in premium to the reinsurers in consideration of their reinsurance promises and undertakings. But for the financial credits based on the Reinsurance Recoverables permitted by the California statutes referred to above, the Mission Companies could never have issued such a large number of policies to the public. When the Reinsurance Recoverables proved to be unavailable, the Mission Companies became hopelessly insolvent.³¹

²⁹ *Ralphs Grocery Co. v. Reimel*, 69 Cal. 2d 172, 177, 444 P.2d 79, 83, 70 Cal. Rptr. 407, 411 (1968).

³⁰ Certain of the Mission Companies also acted as reinsurers and entered into hundreds of reinsurance transactions ("retrocessions") with reinsurers from all over the world. Under these arrangements, reinsurers ceded business to certain of the Mission Companies.

³¹ The fate of the Mission Companies at the hands of their reinsurers is not an isolated situation, but is a matter of general regulatory concern. This can be seen from cases such as *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2nd Cir. 1988), and *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993),

14. When the reinsurers refused to pay, the available cash was soon dissipated and the Mission Companies could neither pay their direct policyholders' claims, nor pay claims from the reinsurance they had assumed. This circumstance created a domino effect and caused severe financial stress upon several other insurance companies. The webs of reinsurance involving the Mission Companies are typical of those involving the rest of the industry. In view of the massive and precarious interdependence among the world's insurers and reinsurers, the underlying issues in the instant litigation far transcend this particular case.

15. The reinsurers' failure to pay was based upon a series of disputes between the Commissioner and the reinsurers regarding the interpretation of California law and its application to these reinsurance arrangements, particularly in the insolvency context. Despite the California Supreme Court decision in *Prudential*, the dispute continues.

16. Over 180,000 claims have been filed in the Receivership Proceedings by policyholders, third party claimants, and state guaranty associations,³² as well as general

both of which cases involved an insurance commissioner's attempt to recover reinsurance balances from reinsurers who, having taken their share of the premiums, nevertheless refused to pay their share of the losses. See also, *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207 (3rd Cir. 1991); *Corcoran v. Universal Reinsurance Corp.*, 713 F. Supp. 77 (S.D. N.Y. 1989); *Prudential*, 3 Cal. 4th 1118, 842 P.2d 48, 14 Cal. Rptr. 2d 749.

³² The existence of state insurance guaranty associations ("Guaranty Associations") adds an important dynamic to this analysis. Guaranty Associations for property and casualty companies exist in all states. Their function is to pay policyholder claims when an insurer becomes insolvent. There are various provisions as to the kinds of claims that are covered and there are certain caps on the amounts payable. The funds used to make these payments are public funds because, although they come initially from assessments against the member insurers, the insurers later recoup the money

creditors. Allstate and other reinsurers were among these claimants. To date, the Commissioner has recovered approximately \$1.2 Billion from reinsurers, most of which came from settlement agreements. However, the vast majority of those settlements were consummated only after complex litigation, all of which occurred under the auspices of the Receivership Court as the court of original jurisdiction. The instant case involves the interpretation of the various interlocking and/or related reinsurance arrangements and the application of California statutory and case law to them.

17. Unless the Commissioner took affirmative steps to force a turnover of the Reinsurance Recoverables, he could take no effective steps to perform his statutory duties. Accordingly, on December 22, 1986, the Commissioner sued approximately 144 reinsurers.³³ That case, "Gillespie I," was consolidated with the liquidation proceedings and has been, for all relevant purposes, continuously presided over by the Honorable Kurt J. Lewin of the Receivership Court. The instant complaint (hereinafter sometimes called "*Quackenbush*") was filed in June 1990, as a related case, and alleges causes of action identical to those in *Gillespie I*. Jt. App. pp. 35-63. On August 30, 1990, Allstate removed this action to the federal district court based on diversity grounds under 28 U.S.C. § 1441 and filed a motion to compel arbitration. Jt. App. pp. 73-76 and 77-95.

18. After removal, the Commissioner filed a motion to remand challenging jurisdiction and seeking abstention

either by taking a direct offset against premium taxes due the state (in which case the state treasury bears the financial burden) or by surcharging policyholders (in which case the burden falls upon the insurance-buying public). When the reinsurers refuse to pay, the public pays. This is one more reason the underlying proceedings involve a vital public concern.

³³ The number of defendants later grew to approximately 300.

under the *Younger*,³⁴ *Colorado River*³⁵ and *Burford*³⁶ abstention doctrines. The district court found it had jurisdiction over the action, and, consistent with the numerous cases deferring to state courts in similar situations involving insolvent insurers,³⁷ then granted the Commissioner's motion to remand. The district court held that, if it were to adjudicate this action, it would be required to determine an important matter of state law and interfere with the California statutory scheme for the regulation of the insolvency of insurance companies. (Pet. App. B., p. 31a). The district court noted, in particular that this case involved the "critical" claims question of whether a reinsurer is entitled to set-off amounts allegedly owed to the Mission Companies under the provisions of the state statutes (Cal. Ins. Code § 1031). (Pet. App. B, p. 34a). After a thorough review and analysis of the abstention doctrines the district court concluded that *Burford* abstention was called for, holding that:

³⁴ *Younger v. Harris*, 401 U.S. 37 (1971) [hereinafter *Younger*].

³⁵ *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) [hereinafter *Colorado River*].

³⁶ *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) [hereinafter *Burford*].

³⁷ See, e.g., *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 43-44 (2nd Cir. 1986), cert. denied, 481 U.S. 1017 (1987); *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2nd Cir. 1988); *Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033 (3rd Cir. 1988); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 707 (10th Cir. 1988), cert. denied, 489 U.S. 1096 (1989); *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990); *Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249, 254-55 (5th Cir. 1990); *Barnhardt Marine Ins., Inc. v. New England Int'l Sur. Inc.*, 961 F.2d 529, 531-32 (5th Cir. 1992); *Aims Enters. Inc. v. Muir*, 609 F. Supp. 257 (M.D. Pa. 1985); *Capitol Indem. Corp. v. Curiale*, 871 F. Supp. 205 (S.D.N.Y. 1994); *Mathias v. Lennon*, 474 F. Supp. 949 (S.D.N.Y. 1979); *Metropolitan Life Ins. Co. v. Board of Directors of Wisconsin Ins. Sec. Fund*, 572 F. Supp. 460 (W.D. Wis. 1983); *Mondrus v. Mutual Ben. Life Ins. Co.*, 775 F. Supp. 1155 (N.D. Ill. 1991); and *Sabato v. Florida Dept. of Ins.*, 768 F. Supp. 1562 (S.D. Fla. 1991).

California has an overriding interest in regulating insurance insolvencies and liquidation in a uniform and orderly manner. If the Court were to adjudicate the Commissioner's reinsurance dispute with Allstate, and specifically the hotly contested set-off issue, then this important state interest could be undermined by inconsistent rulings from the federal and state courts.

Pet. App. B., p. 34a. Accordingly, the district court ordered the remand of this case to the Receivership Court.

19. On appeal by Allstate, the Ninth Circuit Court of Appeals, in a narrowly focused opinion, reversed the decision of the district court. The Ninth Circuit held, first, that review of the remand order in this case was not barred by 28 U.S.C. § 1447(d) and that the remand order based on abstention was a final collateral order reviewable on appeal; and, second, that under decisions of this Court, particularly *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) [hereinafter *NOPSI*], a district court *never* has the power to exercise any discretion, regardless of the circumstances presented, to abstain under *Burford* if the suit involves a purely "legal action," as opposed to an action "in equity." The Ninth Circuit wrote: "The Supreme Court's recent, restrictive reading of *Burford*, together with its reaffirmation of the doctrine's equitable predicate, leads us to conclude that a district court may not abstain under *Burford* when the plaintiff seeks only legal relief." (Pet. App. A, p. 12a).

20. On May 19, 1995, the Ninth Circuit denied a petition for rehearing and rejected a suggestion for rehearing en banc. (Pet. App. C). On October 16, 1995, this Court granted the Commissioner's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

I. THE COURT BELOW ERRED IN PERMITTING ALLSTATE TO APPEAL THE REMAND ORDER.

The important disputes to be determined in the instant case are Allstate's asserted right to arbitrate and the claimed offset rights. But the subject remand order itself made no determination other than the decision to remand. In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53 (1976), this Court held squarely that a remand order which does not determine even the forum in which the dispute will ultimately be decided is not subject to an appeal and can only be reviewed by mandamus.

The Ninth Circuit decision below nevertheless held that the remand order in this case is a final collateral order within the meaning of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and is, therefore, appealable under *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). This interpretation of *Moses H. Cone* and *Cohen* places the court below, erroneously, in conflict with this Court's decision in *Thermtron*.

Neither *Moses H. Cone* nor *Cohen* involved a remand order or abstention. Instead, *Moses H. Cone* involved a stay of a federal action solely because there was a pending state court action, and *Cohen* presented a very special situation in which the federal district court refused to apply a New Jersey statute that would have required plaintiff to post pre-trial security. In *Cohen*, the defendant was about to be forever denied a valuable and important right separate from, and collateral to, the merits of the suit. That case therefore fell into a "small class" of decisions which affect collateral rights too important to be denied review and too independent of the cause of action to require deferral of appellate consideration until the whole case is adjudicated. The instant case does not present sufficiently similar facts to justify application of the "final collateral order" rule.

The decision below in *Quackenbush* stands or falls on the legitimacy of the view that the decision to remand, *by itself*, sufficiently affects an important right that is completely separate from the merits and that is too important to be denied review at the conclusion of the case. To accept this as a proper view would permit *all* remand orders to be appealable unless they come within the bar of 28 U.S.C. § 1447(d). See *Thermtron*, 423 U.S. 336. Adoption of this rule would substantially increase the burden on the federal appellate system.

It is significant that the *Quackenbush* remand order did not place any party "out of court" any more than any other remand order based on abstention principles. Moreover, under *Thermtron*, the remand order remains, in proper circumstances, reviewable in the federal system by mandamus (or, if both trial and appellate courts concur, by interlocutory appeal under 28 U.S.C. § 1292(b)).

Because the district court remanded without reaching the issue of either arbitrability or offset, all issues remain open for initial resolution in state court. If arbitration is allowed, the issue will be moot; if it is denied, then Allstate retains such rights as it may now have to obtain a review in federal court of any federal issues raised.

Since *Thermtron*, this Court has decided a number of other cases applying the *Cohen* doctrine. These include *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989), and *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. —, 114 S. Ct. 1992 (1994). As discussed below, the natural consequence of *Thermtron* and these latter cases is to hold that the instant case utterly fails the collateral order test.

It fails for several reasons. First, it does not present a conclusive determination of an important disputed question in that it has not even determined in what forum the case will proceed. Second, it does not determine an important and unsettled question of controlling law completely separate from the merits; it simply involved the exercise of the district court's discretion. Third, it is not

"effectively unreviewable" on appeal in the sense of meeting the *Cohen* requirements because among other things, Allstate cannot show that it will never have recourse again to federal courts. Under these circumstances, the subject order fails at least one essential prong of the test, in which case it fails the test.³⁸

II. THE COURT BELOW ERRED IN REVERSING THE REMAND ORDER ON THE GROUNDS THAT THE DISTRICT COURT HAD NO DISCRETION TO ABSTAIN IN A CASE INVOLVING AN ACTION AT LAW.

The decision below attempts to superimpose the ancient dichotomy between "actions at law" and "suits in equity" on the administration of the abstention doctrine. This Court has never held that abstention is automatically precluded where the underlying action is one at law, and should not do so now.

The imposition of the law/equity distinction upon abstention doctrines would be inconsistent with modern procedure embodied in the provision of Rule 2 of the Federal Rules of Civil Procedure, which merges law and equity into one form of action known as a "civil action." District courts are not required to grant or withhold rights or remedies based upon the form of the action pleaded. *Ross v. Bernhard*, 396 U.S. 531 (1970).³⁹ Thus, the rule below would improperly restrict the powers and prerogatives of the district courts and undermine the effect of the Federal Rules of Civil Procedure.

This Court has permitted abstention in cases of law. See, e.g., *Louisiana Power & Light Co. v. Thibodaux*,

³⁸ See *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Lauro Lines*, 490 U.S. 495; *Digital Equip.*, 114 S. Ct. 1992, all discussed below.

³⁹ See also, Dan Dobbs, *Dobbs Law Of Remedies* (2d ed. 1993) Vol. 1 Section 2.6, p. 148: "So today the judge deciding . . . [a] case may apply rules that originated in equity because those are the rules that govern the facts; it will not be necessary to ask whether the court sits as an equity court or a law court because it *always sits as both* (emphasis added)." *Id.* at 150 (citing *Ross*, 396 U.S. 531).

360 U.S. 25, 28 (1959); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 (1981); *Langnes v. Green*, 282 U.S. 531 (1931). Thus, it has recognized that abstention doctrines should be rooted, not in an obsolete distinction, but in the deeper policy considerations derived from principles of federalism.

Once a district court's jurisdiction is invoked in a "civil action," the court should be permitted to exercise its discretion to grant any relief legitimately requested by a party. Abstention is the exercise of the court's "equitable discretion," *Burford*, 319 U.S. 315 at 317-18, or its "equitable restraint." See *Fair Assessment*, 454 U.S. at 108; *Baggett v. Bullitt*, 377 U.S. 360 (1964). Thus, a motion to remand on abstention grounds should be viewed as invoking the equitable powers of the district court to order abstention, thereby permitting an order of remand regardless of the formal character of the underlying dispute.

This Court has previously recognized an abstention-like doctrine for insurance insolvency proceedings and for those relating to building and loan companies. *Penn Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935); *Pennsylvania v. Williams*, 294 U.S. 176 (1935). These cases recognize the special status of state court insolvency proceedings and the propriety of federal court deference to those proceedings. The Court reasoned that even though the district court had subject-matter jurisdiction, the discretion of the court was properly invoked by a motion to relinquish that jurisdiction in favor of the statutory administration of the insolvency in state court.

The Ninth Circuit rule would disregard principles of federalism and interfere with the police power of the states as exercised in the regulation of the business of insurance. The rule would subordinate the Congressional intent, as expressed in the McCarran-Ferguson Act and in exemption of insurance companies from treatment as

debtors under federal bankruptcy laws, to the equity/law dichotomy of a prior era. To hold that principles of judicial federalism may *never* be advanced in a case where the underlying cause of action is one "at law" would needlessly and improperly hinder the administration of justice.

The rule below would also disrupt California's interest in an integrated system of insurance regulation and its ability to further its public interest and protect policyholders in the case of insurer insolvency or delinquency. The Mission Companies have been subject to state court proceedings for approximately 10 years. The Receivership Court has issued a number of orders assuming sole and exclusive jurisdiction. The California statutes mandate that claims against the insolvents' estates will be filed in the Receivership Proceedings and adjudicated by the Commissioner, subject to review of the Receivership Court. The marshaling of assets, particularly sums due from reinsurers, and the adjudication of claims are core functions of the state proceedings which would be disrupted if the Commissioner is subjected to litigation in multiple courts or if Allstate and other claimants are permitted to file claims under the state statutes and then remove them to federal courts for adjudication.

ARGUMENT

I. THE COURT BELOW ERRED IN PERMITTING ALLSTATE TO APPEAL THE REMAND ORDER.

The district court's remand order, based on its determination that abstention was appropriate, was not an appealable order under the precepts of appealability that have been laid down by this Court. The remand order did not terminate the case, and since the question of the arbitrability of the issues presented was not resolved, it did not even determine the forum in which the merits of the case would be adjudicated. The Ninth Circuit's view that the decision to remand is, by itself, a proper subject of appeal was squarely rejected by this Court in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53 (1976), in which the Court stated that a

remand order is not reviewable on appeal, but only, in appropriate cases, on writ of mandamus.⁴⁰

Despite this controlling authority, the Ninth Circuit held that the remand order was an appealable collateral order under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), as interpreted in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). This reasoning is flawed, and its acceptance would ignore the finality requirement and unduly burden the federal appellate courts.⁴¹

The *Cohen* case itself is plainly distinguishable from the instant case. In *Cohen*, which did not involve an issue of abstention or remand, a federal district court sitting in diversity held inapplicable a statute of New Jersey, the forum state, requiring certain complainants in a stockholder derivative action to post security for the corporation's reasonable expenses of litigation at the outset of the suit. Since the district court's order meant that the corporation might be forced to endure an entire trial

⁴⁰ Both the First and Second Circuits, in well-reasoned opinions, have taken a position directly contrary to that of the court below. See, e.g., *Minot v. Eckardt-Minot*, 13 F.3d 590 (2nd Cir. 1994) (holding, in a case very similar to this one, that a remand order that fails even to determine the forum for adjudication of the dispute is not appealable); *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2nd Cir. 1988) (holding, again in a case almost identical to this one, that a district court's remand order was reviewable only on petition for mandamus); *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993) (same); see also, *Traveler's Ins. Co. v. Keeling*, 996 F.2d 1485 (2nd Cir. 1993) (to the same effect).

⁴¹ In reaching its conclusion, the court below followed its own precedent, e.g., *Pelleport Investors, Inc. v. Budco Quality Theatres*, 741 F.2d 273 (9th Cir. 1984). At the same time, the Ninth Circuit conceded that this precedent was difficult (if not impossible) to reconcile with other precedent in the Ninth Circuit holding unappealable decisions to remand pendent state claims after dismissal of the attached federal claims. See, e.g., *Executive Software N. Am. v. United States Dist. Court*, 24 F.3d 1545, 1562 (9th Cir. 1994). See Pet. App. A, p. 7a, n.7.

without the benefit of the security required by state law, the failure to permit an appeal would have left the corporation without any recourse. No post-trial reversal could remedy the fact that the trial would have already occurred without the posting of the security. Thus, the risk of being unable to recover the costs—a risk the state statute was designed to avoid—would irreparably have occurred by the end of the trial. Under these circumstances, the Court concluded that the denial of security “finally determine[d]” a claim of right too important to be denied review. *Cohen*, 337 U.S. at 546.

In the instant case, the circumstances are very different. The relevant state law in *Cohen* would either be applied before trial or not at all. Here, the order of remand resolves neither the issue of arbitrability (which will determine the forum where the merits are to be initially adjudicated) nor the dispute regarding Allstate's claimed offsets.⁴² In *Quackenbush*, the district court simply remanded to state court the *same* case that began there. Thus, unless this Court is willing to decide that the solitary action of abstaining and ordering a remand is completely sufficient to meet the *Cohen* test,⁴³ then the

⁴² As the First Circuit stated in *Doughty*: “The remand order at issue here does not pass muster under *Cohen*. The salient legal question that stands separate and apart from the merits in this case—that is, the ‘collateral’ issue—is whether the parties’ overall dispute should be resolved in arbitration. The district court’s ruling did not conclusively determine this issue. . . . Instead, the collateral issue remains an open matter—a matter the state court must yet decide. We agree with the Second Circuit that, to come within the collateral order rule, a decree must definitively resolve the merits of the collateral issue, not merely determine which court will resolve it.” *Doughty*, 6 F.3d at 863.

⁴³ “First, the order must ‘conclusively determine the disputed question.’ Second, it must ‘resolve an important issue completely separate from the merits of the action.’ Third, it must be ‘effectively unreviewable on appeal from a final judgment.’ If the order fails any one of these requirements it is not appealable under the collateral order exception.” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)). See also, *Lauro Lines s.r.l. v.*

instant case cannot come within the collateral order rule.⁴⁴ The only "harm" claimed by Allstate is its claimed interest in avoiding litigation in a state court rather than a federal one. This is not sufficient under either *Cohen* or more recent decisions of this Court.

Cohen presented the quintessential situation where an important issue of controlling law was unjustly relegated to a legal cul de sac from which it could only be rescued by the collateral order doctrine. Thus, this Court was presented with a compelling situation warranting an exceptional remedy. One would not reasonably expect a case presenting such compelling circumstances to occur as an everyday matter. However, remands do routinely occur; and logic alone dictates that remands cannot fall into the "small class" of cases for which the narrow exception permitted by *Cohen* was intended.

This Court has said the collateral order rule is intended to be "narrow" and "exceptional," but the Ninth Circuit's approach would render the rule broad and common. To expand the *Cohen* rule so that the single act of remanding on abstention grounds would meet all three prongs, even though no other determination is made, would permit what is supposed to be a "narrow exception" to "swallow the general rule."⁴⁵

At this stage of this case, Allstate can only claim a possibility that it will be required to litigate in state court, because its motion to require the offset dispute to be arbi-

Chasser, 490 U.S. 495 (1989); *Digital Equip. Corp. v. Desktop Direct*, 114 S. Ct. 1992 (1994).

⁴⁴ Furthermore, Allstate has not shown that it will lack recourse to federal court, if appropriate, at a later stage of this litigation.

⁴⁵ If the district court had applied the New Jersey statute but set a very low bond, this Court would not have held the order appealable. Similarly, if *Cohen* had been a remand case and proceeded under state law, the narrow circumstance that created the conundrum would not have occurred. Indeed, it was the failure of the district court in *Cohen* to accord appropriate deference to state law which created the problem in the first place.

trated remains pending. If the motion is granted, then Allstate will achieve its preferred forum—arbitration. If the motion is denied, as Allstate may predict it will be, then a new set of complex issues will arise concerning substantial questions of the proper relation of state and federal law to the issue of whether the arbitration clause can overrule the state statutory scheme,⁴⁶ but those issues were not adjudicated below and are not presented here. Consequently, Allstate cannot, at this stage, show that it will have no further recourse to federal court.

Under these circumstances, Allstate receives no support from *Moses H. Cone*. In that case, the petitioner had filed a state court action seeking a declaratory judgment that the respondent had no right to arbitrate a dispute and obtained an *ex parte* injunction (later dissolved by the state court) against the taking of any steps toward arbitration.⁴⁷ Thereafter, the respondent filed a *separate* federal court diversity action to compel arbitration, and this Court held that the federal court's order staying its own proceedings pending the outcome of the state proceedings was appealable because (given the inevitable res judicata effect of the *separate* state court action) the federal stay order amounted to a dismissal of the suit "when the sole purpose and effect of the stay are precisely to surrender jurisdiction of a federal suit to a state court." *Moses H. Cone*, 460 U.S. at 11 n.10. In contrast, *Quackenbush* involves a remand of a state court suit back to state court based upon abstention doctrines.

There are at least two critical differences between *Moses H. Cone* and the present case. First, the federal court proceeding here is not a separate proceeding from that commenced in the state court; it is the *same* proceeding. Second, and closely related, in *Moses H. Cone*, the district court's order staying its hand effectively ter-

⁴⁶ See e.g., *Doughty*, 6 F.3d 856, where this same issue was decided against the reinsurer.

⁴⁷ In the instant case, the continuing state court injunctions against litigation in other forms remain in place.

minated the *separate* federal proceeding because the district court had already ruled on the matter, and the state court's decision on the issue of arbitrability would have final and preclusive effect on the separate federal litigation. Allstate cannot show that the instant case is in the same posture because it is not. It remains to be seen how the California courts will rule on the propriety of arbitration given the interplay among the statutory insolvency scheme, the McCarran-Ferguson Act, the Federal Arbitration Act, and the other comity, federalism and public policy issues discussed later in this brief. But these are issues of vital state concern. It would, in any event, be fitting in a removal case that a federal court abstain by remanding in such a circumstance, because potential federal law issues may be mooted. If such issues remain, then Allstate may well have recourse to the federal courts again.

The true posture of this case is that Allstate is not necessarily out of any court; it was simply not granted its desire to litigate in federal court in the first instance⁴⁸ and it will, instead, be required to go to its less preferred forum.

The Ninth Circuit decision below relies very heavily on the statements in *Moses H. Cone* that the stay placed that plaintiff out of federal court, but as is pointed out, that is not necessarily so in this case. However, the Commissioner also asserts that the collateral order doctrine should not apply to this case unless Allstate can show more than the bare circumstance that it has been sent back to state court. For example, in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the district court refused to certify a class action and the putative representative plaintiff attempted to appeal on the grounds that refusal to certify the class action effectively ended the entire case. This Court accepted the argument that this might end the suit, but held that fact insufficient to war-

⁴⁸ Of course, Allstate does not want ultimately to litigate in any court, it wants to arbitrate, but this does not change this analysis.

rant an immediate appeal. Accordingly, while the court below has relied on the notion that being "put out of federal court" is *all* that is required to invoke the collateral order doctrine, that cannot have been the Court's intent or else it would have decided *Coopers & Lybrand* to permit an immediate appeal.

Here, the decision to remand was a proper exercise of the trial court's discretion, as is argued in detail below, as to the abstention issues.⁴⁹ The dispute on appeal to the Ninth Circuit was only over whether that discretion was properly exercised and was not over a *collateral* issue of *controlling law* in the sense of the *Cohen* doctrine.

This was not a proper basis upon which to invoke the collateral order doctrine in *Cohen*. Indeed, to satisfy the *Cohen* test, the "issue on appeal must involve 'an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court's discretion.'" ⁵⁰ The Commissioner asserts that this circumstance is a further ground to deny the applicability of the *Cohen* exception in this case.

In *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989), the Court held unappealable the denial of the defendant's motion to dismiss, based on a contractual clause requiring suit to be brought in Italy. The Court held that the third prong of the *Cohen* test, that the dispute as to an important matter be effectively unreviewable on appeal from a final judgment, was not satisfied because the asserted right to have the litigation occur in a particular forum as

⁴⁹ Indeed, the issues relating to the remand are sufficiently entangled in the merits that one might question whether they are completely separate from the merits for purposes of the collateral order doctrine. *C.f. Coopers & Lybrand*, 437 U.S. at 469 n.12, regarding the "entanglement" with merits of a class certification decision.

⁵⁰ See, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 292; (Scalia, J. concurring and emphasizing this point and also noting that the Court should provide further limiting principles so that the *Cohen* appeals will be "as we originally announced they would be, a small class [of decisions] . . . too important to be denied review.")

opposed to another was not effectively unreviewable. The fact that the appellant would be required to endure a full trial in the disfavored forum was not enough because that right, while not perfectly secured by appeal after final judgment, was adequately capable of vindication at that stage. Referring to the Court's opinions in *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431 (1985) and *Coopers & Lybrand*, the Court said: "We have held that to fall within the *Cohen* exception, an order must satisfy at least three conditions: It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" *Lauro Lines*, 490 U.S. at 498 (emphasis added).

The Court did not expand on its reference to the existence of "at least" three conditions, but perhaps this was intended to emphasize that the test is not intended to be a mere "fill-in-the-blanks" test with only three blanks that can be satisfied with the same entry in each blank. This highlights the question of whether the Court ever intended that a single remand order such as the one in this case could satisfy all possible requirements. The Ninth Circuit rule would permit the *Cohen* test to be satisfied with the three "blanks" filled with the same condition: "the district court remanded the case." But the real issues involved in the instant remand were the exercise of the court's discretion and Allstate's preferred choice of forum. If the right to be sued in a favored forum was insufficient in *Lauro Lines*, there is no good reason to find it sufficient in this case even if the district court's determination otherwise met the first and second prongs, which it does not.

These observations aside, the concurring opinion in *Lauro Lines* emphasizes that in *Cohen* the Court required that the rights in question be "too important to be denied review." *Lauro Lines*, 490 U.S. at 498. This concept of importance was not illuminated in *Moses H. Cone*, but it was discussed further by the Court in *Digital Equipment*, 114 S. Ct. 1992.

In *Digital Equipment*, this Court reaffirmed that choice of forum issues are insufficient to satisfy *Cohen*, and held that "the collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in Section 1291, but as a 'practical construction of it,'" and that the doctrine applies to "only those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Id.* at 1995. This language, and the discussion at page 2001, appear to incorporate the element of "importance" into both the second and third prongs of the *Cohen* test. Whether the element of importance is a key to satisfying both the second and third prongs or only the third is somewhat academic, since to fail one prong is to fail the test. In either case, the Ninth Circuit view is inconsistent with this Court's decisions. It therefore follows that the Ninth Circuit has erred and that a remand order would not meet the *Cohen* test even if it did select the ultimate forum because forum preference is of insufficient "importance" to satisfy the *Cohen* test.

In *Digital Equipment*, this Court also said that "we have also repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule."⁵¹ Further, under *Thermtron*, Allstate fails the first prong because the remand order does not present a conclusive determination of the disputed question. To begin with, neither arbitrability nor the offset issues were decided. These were the "important" disputes before the court in the *Cohen* sense. This remand order involves solely a question of the proper exercise of the trial court's discretion.

In *Thermtron*, this Court carved out a narrow exception to the express statutory prohibition (in 28 U.S.C.

⁵¹ *Digital Equip.*, *id.* at 1996 (citing *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985)). See also, *Garcia v. Island Program Designer*, 4 F.3d 57, 60 (1st Cir. 1993).

§ 1447(d)) of any review of remand orders—an exception that was not only vigorously criticized in the dissenting opinion in that case but that has also met with significant academic criticism.⁵² If that narrow exception is not to swallow up the rule, and threaten the integrity of the finality requirement as well, it is essential that appellate review be limited, as the Court stated in *Thermtron* to the extraordinary writ of mandamus; otherwise every remand order not explicitly based on “jurisdictional” grounds will be automatically appealable.

As the court below explicitly recognized, the difference between allowing a district court order to be appealed and permitting review only on mandamus is not simply a matter of semantics. Mandamus is an extraordinary writ that, as this Court has made clear, is not routinely available. At the same time, the availability of mandamus serves to safeguard against manifest abuse of the discretion to order remand on abstention grounds.⁵³ Thus, the party seeking to litigate in federal court has access to a method of review that protects against egregious error, but does not disrupt the proper relationship between federal trial and appellate courts.

In summary, the opinion below rests on the presumption that the decision to abstain was itself either a final order or is a proper collateral order under *Cohen* to permit filing an appeal as opposed to seeking mandamus. To accept this view would be to consume the rule with the exception. The resulting delay in the process of litigation would have a negative impact upon the administra-

⁵² See, e.g., Michael Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287 (1993). Professor Solimine is also critical of a number of lower court decisions, including the Ninth Circuit's decision in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), that appear to have extended the scope of *Thermtron*. See, 58 Mo. L. Rev. 312-15.

⁵³ The Commissioner maintains that the district court's order in this case was, not only well within its discretionary authority, but was manifestly correct.

tion of justice and place a substantial burden on federal appellate resources.

II. THE COURT BELOW ERRED IN REVERSING THE REMAND ORDER ON THE GROUNDS THAT THE DISTRICT COURT HAD NO DISCRETION TO ABSTAIN IN A CASE INVOLVING AN ACTION AT LAW.

A. The Court Should Not Restrict Abstention Doctrines On The Basis Of The Equity/Law Distinction.

The Ninth Circuit held that a federal district judge has no power under *Burford* to abstain in a case where the underlying action is at law, as opposed to an action in equity.⁵⁴ The Ninth Circuit's opinion is clear and crisp. It draws a hard line between areas where judicial discretion exists and areas where there is no discretion. The effect of the opinion below is to preclude abstention entirely with respect to insurance insolvency proceedings where the underlying action is not an action “in equity.” If this Court approves such a rule with respect to insurance insolvency proceedings, it will seriously impinge upon the ability of the states adequately to rehabilitate or liquidate insurers.

California's statutory scheme clearly contemplates that there will be a single, integrated proceeding to devise and implement rehabilitation plans, to marshal assets, accept and adjudicate claims, and otherwise to protect policyholders. These functions cannot be meaningfully carried out if the various elements necessary to the process can be spread out over multiple jurisdictions.⁵⁵ The decision below will, among other detriments, permit a reinsurer

⁵⁴ In this view, the Ninth Circuit is at odds with other circuits. See, e.g., *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995); *General Glass Indus. Corp. v. Monsour Medical Found.*, 973 F.2d 197 (3rd Cir. 1992).

⁵⁵ See *supra* note 25.

to file claims⁵⁶ in the state court proceedings, as mandated by state law, yet effectively remove them for trial to federal court. This result is directly in contravention of the provisions of the California Insurance Code for handling claims.⁵⁷

Indeed, as in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), Allstate might have filed a damage suit directly in federal court against the Commissioner, as might have several dozen or a hundred reinsurers in multiple district courts. If, in such an event, the district courts were powerless to apply an abstention doctrine, then the entire statutory scheme of California and other states would be rendered ineffective. Whether such suits were cleverly couched in terms of 42 U.S.C. § 1983, as in *Fair Assessment*, or were filed simply on diversity grounds, they would be suits "at law," and the Ninth Circuit decision would absolutely prevent abstention. A receivership court that cannot control the multiple elements of an insolvency case cannot effectively function.

Since this Court has never taken the position that abstention doctrines are to be separated into watertight compartments, it should not now endorse a rule that handcuffs abstention precepts and the important principles of judicial federalism to equity/law distinctions from a prior era.⁵⁸ There have been and will continue to be situations in which abstention is justified where the underlying cause of action sounds in law.⁵⁹ To forbid even the possibility

⁵⁶ Allstate's offset defenses in this litigation are precisely the same claims contained in the proofs of claim filed by Allstate in the Receivership Proceedings.

⁵⁷ See *supra* Statement of the Case, ¶ 6, p. 6-8.

⁵⁸ Substantially every point this Court made in *Gulfstream*, 455 U.S. 271, 283-87, about why the perpetuation of the *Enelow-Ettleson* rule was insupportable after the merger of law and equity in the federal courts is applicable to the instant case.

⁵⁹ Assuming, *arguendo*, that the underlying suit here is one "at law," then this case is a classic example of why abstention should not be completely precluded in such cases.

of abstention in a case "at law" would unreasonably curtail the ability of the judiciary to perform one of its important functions: the striking of a reasoned balance between state and federal courts.⁶⁰

1. *Such A Rule Would Be Inconsistent With Modern Procedure.*

Superimposing the ancient dichotomy between law and equity upon abstention doctrines would be out-of-step with our modern system. Rule 2 of the Federal Rules of Civil Procedure highlights this point. That Rule, by creating "one form of action known as a 'civil action'" in federal courts, resulted in a merger of law and equity and in the abolition of the forms of action. A court's *complete* jurisdiction is invoked by bringing a "civil action" and the court may thereafter grant all appropriate relief. The result of Rule 2 is that law and equity were combined and "nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court." *Ross v. Bernhard*, 396 U.S. 531, 540 (1970).⁶¹

The artificiality of imposing the equity/law distinction upon current procedures, is further demonstrated, for example by: i) Rule 8(e)(2), which permits a party to combine in one civil action as many separate claims or

⁶⁰ Concepts such as those discussed in *Younger* concerning the "ideals and dreams of 'Our Federalism'" and the need to respect and preserve concepts which mandate "sensitivity to the legitimate interests of both State and National Government" should not be disassociated by a hard and fast rule that would forbid abstention based on essentially irrelevant notions of the difference between law and equity.

⁶¹ This Court stated: "Under the Rules there is only one action—a 'civil action'—in which all claims may be joined and all remedies are available. Purely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity, was destroyed. . . . under the rules, law and equity are procedurally combined; nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court." *Ross*, 396 U.S. at 539-40.

defenses as the party has regardless of consistency and whether based on legal, equitable or maritime grounds; ii) Rule 18, which permits the joinder of all claims without regard to whether they are legal, equitable or maritime, and which also permits the joinder of remedies, with the court authorized to grant relief in accordance with the relative substantive rights of the parties; and iii) Rule 54(c), which provides that the court will give all relief to which a party is entitled, even if the relief was not demanded in the party's pleadings.⁶²

Under these circumstances, there is generally no place in federal civil practice for the granting or withholding of rights or remedies based upon the form of the action pleaded.⁶³ As this Court noted in *Gulfstream*, 485 U.S. at 271, "Suits that involve diverse claims and request diverse forms of relief often are not easily categorized as equitable or legal . . . [and . . . the *Enelow-Ettelson* rule has placed courts] 'in the unenviable position of . . . solving modern procedural problems by the application of labels which have no currency . . .'" *Id.* at 284. This Court said the *Enelow-Ettelson* doctrine was, among other things, "divorced from any rational or coherent appeals policy." *Id.* at 285. The same would be true of perpetuating the law/equity dichotomy in the abstention doctrines.

2. Such A Rule Denies The District Court Its Proper Authority.

Once a "civil action" is properly removed to a district court, that court has those powers and prerogatives given it by the Rules of Civil Procedure.⁶⁴ The relief the district

⁶² Also, a court may abstain *sua sponte*. *Bellotti v. Baird*, 428 U.S. 132, 143 (1976).

⁶³ There are still some applications, not relevant to the issues in this case, such as the right to a jury trial. The Seventh Amendment, however, is controlling in this regard. U.S. Const. amend. VII.

⁶⁴ In *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563 (1939), even under prior practice, this Court held that the power of the courts to have "cognizance . . . of all suits of a civil nature at common law or in equity" does "not define the jurisdiction of the

court may grant is not limited under the Rules by forms or consistency of pleading, by the equity/law distinction, or even by the relief requested. The court may grant complete relief without regard to the form of the pleading and without regard to whether the relief would have been considered equitable or legal under prior law.⁶⁵

It is inconsistent with our current federal procedural system to rule that the district court is barred from exercising its principled discretion in applying abstention doctrines unless the underlying pleadings sound in equity.

3. This Court Has Not Limited Abstention Doctrines To Equity Suits, Nor Should It.

Many square-peg/round-hole difficulties would arise by an attempt to force ancient distinctions into a modern system where the underlying proceedings are often combinations of actions at law, actions in equity, and actions pursuant to statutes. Indeed, in the instant case the underlying action is intimately connected with a state statutory scheme and the operation of a highly regulated industry where the Commissioner embodies the police power of the state and acts in an industry long recognized as involving vital public concerns.⁶⁶

district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit . . . is an appropriate one for the exercise of the extraordinary powers of a court of equity." *Id.* at 568 (citing *Pennsylvania v. Williams*, 294 U.S. 176 (1935) (emphasis added)).

⁶⁵ Prior to the adoption of the Constitution, the states were far from uniform with respect to the maintenance of the equity/law dichotomy in their courts. This can be seen in Alexander Hamilton's discussion of the right to a jury in civil cases and the nature of the judiciary. The Federalist Nos. 80, 83 (Alexander Hamilton).

⁶⁶ The Ninth Circuit itself is fully aware of the need to grant deference to state insurance insolvency proceedings, and it did so in *Morgan Stanley Mortgage Capital v. Insurance Comm'r*, 18 F.3d 790 (1994), in which it approved a district court's dismissal of a diversity action in deference to a pending state court insurance

To be sure there are important factors supporting the exercise of federal jurisdiction, but this Court has also decided that there can be compelling reasons for federal courts to abstain from exercising their jurisdiction in particular circumstances.⁶⁷ This Court's decisions regarding abstention have rested upon a full analysis of the case at hand; not upon the mere form of the pleadings.

Although many of the cases in which this Court has ordered or upheld abstention have involved actions in equity, that has not been uniformly the case.⁶⁸ Thus, the

insolvency. Circumstantially, *Morgan Stanley* involved a proceeding in the same receivership court as the Receivership Court in *Quackenbush*. The state court had issued very similar injunctions pursuant to the same statutes in order to assume jurisdiction over the assets of Executive Life Insurance Company. The motion filed with the district court in *Morgan Stanley* was virtually the same as that filed in the district court in *Quackenbush*. In *Morgan Stanley*, the particular district court dismissed; in the instant case the district court abstained and remanded, but the jurisdictional issues were essentially the same. In *Morgan Stanley*, the Ninth Circuit held that the district court properly deferred to the Receivership Court due to the various orders of the Receivership Court which assumed the sole and exclusive jurisdiction over the insolvent's assets. In *Quackenbush*, it reversed the remand order. The only material distinction between the two cases appears to be that the Ninth Circuit felt compelled to apply the equity/law distinction to abstention cases because of *NOPSI* and Ninth Circuit precedent, but had no such compulsion where the district court dismissed instead of abstaining. If the district court in this case had dismissed in favor of the Receivership Court, then under *Morgan Stanley*, the Ninth Circuit would apparently have affirmed the district court. These two very different results hinge completely upon the equity/law distinction as applied to *Burford* abstention by the Ninth Circuit. Such a result is inappropriate.

⁶⁷ "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required." *Colorado River*, 424 U.S. at 818.

⁶⁸ See, e.g., *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 (1981);

fact that a particular prior case involved an equitable proceeding appears to be a *circumstance*, but not a *pre-requisite* to the invocation of abstention doctrines in all cases.

Because federal courts have a continuing duty to examine their own jurisdiction and because many abstention cases involve questions as to the district court's jurisdiction, it is no surprise that most, if not all, abstention cases comment on the basis of the court's jurisdiction.⁶⁹ The Ninth Circuit deemed the various references in this Court's opinions to a "court sitting in equity," an "equity court" and a "court of equity" in *NOPSI*, *Burford* and *Alabama Pub. Serv. Comm'n v. Southern R. Co.*, 341 U.S. 341 (1951), as statements of interest to impose an absolute limit on abstention to "equity cases" and to bar abstention in suits "at law." To attribute such a restrictive effect to those statements ignores the context in which they were made; the references are more properly viewed as observations as to the source of authority to abstain—as affirmations that the district court had discretion to abstain in the exercise of its traditional powers. Because of the merger of law and equity in the federal courts, a district court *always* has the capacity to exercise its "equitable" powers.⁷⁰ Indeed, under Rule 54(c), a court may award equitable relief in a case where the pleadings allege only causes of action "at law."

In *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 (1981), the underlying cause of action was unquestionably one at law. Permitting damage suits

Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 28 (1959); *Langnes v. Green*, 282 U.S. 531 (1931).

⁶⁹ The very idea of "abstaining" assumes that the court has a choice. A court can only abstain if it has jurisdiction. See, e.g., *Miller-Davis Co. v. Illinois State Toll Highway Auth.*, 567 F.2d 323, 325-26 (1977).

⁷⁰ See *supra* note 39. See also, discussion *infra* part II.A.5 for the argument that even prior to the merger of law and equity in the federal system, the district court could nevertheless exercise its equitable discretion to abstain regardless of the underlying nature of this litigation.

in federal courts against state taxing officials would have had very serious adverse consequences on the administration by the states of their tax laws.⁷¹ *Fair Assessment*, 454 U.S. at 108. The district court granted a motion to dismiss on grounds that it referred to as "comity" under this Court's decision in *Younger*. In this Court's own opinion, it relied on comity and the doctrine of equitable restraint in a case "at law." *Id.* at 116.⁷² The vital state interests of insurance regulators are deserving of the same deference and comity as are the concerns of state taxing authorities.⁷³

Another relevant decision is *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), an action "at law" in which this Court focused initially upon the question of whether there was federal jurisdiction over domestic relations cases. After affirming the long-standing "domestic relations" ex-

⁷¹ This would be equally true regarding insurance regulation.

⁷² Justice Brennan, in his concurring opinion, while suggesting that abstention doctrines had been applied only in equity actions, *id.* at 120 n.4, acknowledged that in *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960), the underlying action was one at law. He also cited this Court's statement explaining its decision in *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 29 (1959), without specifically commenting on the fact that the underlying action in *Thibodaux* was also at law. Further, after referring to abstention as an "application of the comity principle," *Fair Assessment*, 450 U.S. at 120 n.4, he later said that "[t]his is not to suggest that there is no occasion to apply principles of comity in actions at law." *Id.* at 121 n.5. Justice Brennan then approved the action of the district court, but on the basis of the failure to exhaust administrative remedies, acknowledging this is an exercise of comity. Given his earlier statement that abstention is similarly an application of the principle of comity, the philosophical basis of both the majority and concurring opinions was clearly rooted in principles of federalism, comity, and deference to vital state interests.

⁷³ "Few public interests have a higher claim on the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law (citations omitted) or the administration of a specialized scheme for liquidating embarrassed business enterprises. . . ." *Moore v. Sims*, 442 U.S. 415, 428 (1970) (citing *Pennsylvania v. Williams*, 294 U.S. 176 (1935), discussed below).

ception, which divests federal courts of diversity jurisdiction over suits for divorce and alimony decrees, the Court held that the federal courts did have jurisdiction over the particular dispute, which involved the allegation that the respondents had committed torts against the Ankenbrandt's children. *Id.* at 704.

This Court then addressed the issue of "whether, even though subject-matter jurisdiction might be proper, sufficient grounds exist to warrant abstention from the exercise of that jurisdiction." *Id.* Upon this second-step analysis, the Court determined that on the facts of the case, the necessary factors to warrant abstention under *Younger*, *Burford* or *Colorado River* did not exist and, therefore, declined to sanction abstention. But the Court did not indicate any doubt that abstention would have been warranted if appropriate factors had existed. The circumstance that the underlying suit was an action at law was not even mentioned as a factor militating against abstention. To the contrary, the Court specifically acknowledged that *Burford* abstention might be appropriate in certain domestic relations cases, and, since the Court engaged in an abstention analysis, it seems to follow that the equity/law issue was not deemed material. *Id.* at 705-06.

Similarly in *Thibodaux*, as noted above, the underlying suit was "at law," and the majority, in speaking of prior situations in which the Court *required*, not merely sanctioned, district courts to abstain, said:

These prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism. We have drawn upon the judicial discretion of the chancellor to decline jurisdiction over a part or all of a case brought before him . . . Although an eminent domain proceeding is deemed for certain purposes of legal classification a "suit at common law" . . . it is of a special and peculiar nature . . . it is intimately involved with sovereign prerogative.

Thibodaux, 360 U.S. at 27 (internal citations omitted).⁷⁴

⁷⁴ The dissent did not object on the grounds that abstention was barred in an action at law even though it was expressly noted that

In another decision, *Langnes v. Green*, 282 U.S. 531 (1931), an action involving damages for personal injuries, the federal court entered a restraining order preventing a state trial in a parallel proceeding. This Court held unanimously that the district court did have jurisdiction, but should have deferred to the state court. The Court stated, *inter alia*, that "the question which arose was not one of jurisdiction, but, . . . was whether as a matter of discretion that jurisdiction should be exercised to dispose of the cause." *Id.* at 541. The Court observed that the term "discretion" denotes the absence of a hard and fast rule. This observation focuses the issue in the instant case. Here, the court below has attempted to impose a hard and fast rule, but the very principle of abstention requires the exercise of the court's sound discretion. To lay down a flat rule that no court can ever abstain in an action "at law" is not only inconsistent with the concept of discretion, but also ignores a number of cases in which this Court has either sanctioned, or actually required, the exercise of such discretion in such an action.

4. Abstention Should Be Viewed As An Exercise Of The Equity Aspect Of The Court's Merged Jurisdiction.

Under the Federal Rules of Civil Procedure, once jurisdiction attaches, the Court may grant any relief legitimately requested by a party. Thus, if a party seeks to transfer venue, to obtain a more definite statement, a delay in the trial, summary judgment, a protective order, or any other relief permissible, then upon proper motion, the district court has the power to grant it without first

the underlying suit *was* a suit at law. Instead, the dissent was based on arguments that the grounds for abstention were absent. *Id.* at 33. To be sure, there may be fewer circumstances in which abstention grounds will exist in an action for damages than in one in which the *state* is being enjoined. That possibility, however, does not *mandate* a general rule absolutely forbidding abstention in cases "at law" no matter what the impact on "Our Federalism" or other abstention concerns. An insurance insolvency proceeding under the guidance of the Commissioner and a state receivership court involves the state's "sovereign prerogative."

performing an analysis as to whether the underlying remedy sought is legal or equitable. Similarly, there is no reason why the court needs to determine the nature of the underlying pleading prior to granting a motion to remand or to dismiss on abstention principles.⁷⁵ If the transcendent factors recognized by this Court as warranting abstention exist in a given case, then abstention should be granted on the basis of those principles without regard to the historical nature of the particular cause of action pleaded.

Even if a district court must be "sitting in equity" in order to abstain, the determination should be made on the basis of the relief sought in the motion, not on the nature of the complaint in the case. Since abstention is the discretionary exercise of the court's "equity powers,"⁷⁶ then a court is "sitting in equity" when it abstains. If, in an action for damages, a federal court issues an injunction against a state court damage suit, one would not doubt that the court has exercised its equity power despite the fact that *both* the federal and state court suits are actions "at law."

Abstention doctrines are based upon federalism and comity, not the details of pleading.⁷⁷ If this Court adopts the rule of the decision below, then, not only will it depart from its prior decisions, but it will thrust the application of abstention doctrine into a morass in which district courts struggle to apply an antiquated equity/law dichot-

⁷⁵ See generally, David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 550 (1985).

⁷⁶ *Baggett v. Bullitt*, 377 U.S. 360, 375 n.11 (1964); see also, *Fair Assessment*, 454 U.S. at 108.

⁷⁷ In *NOPSI*, for example, this Court said that it inquires "into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case . . . [r]ather, what we look to is the importance of the generic proceedings to the State. In *Younger*, for example, we did not consult California's interest in prohibiting John Harris from distributing handbills, but rather its interest in 'carrying out the important and necessary task' of enforcing its criminal laws." *NOPSI*, 491 U.S. at 365.

omy to modern problems and modern complex litigation.⁷⁸ Eventually, this Court would need to rewrite abstention doctrines to provide standards for determining when the underlying causes of action are in equity or when a sufficient level of equitable causes of action exist in a multiple count lawsuit to warrant a district court's even beginning a reasoned analysis to determine whether it should abstain.

A court should never shirk its duty, but this case presents a powerful question of where that duty lies. The protection of judicial federalism is one of the important duties of all federal courts.⁷⁹ The irony of the decision below is that fundamental principles of federalism would take a back seat to the perpetuation of the equity/law dichotomy. As discussed in Section B, below, the instant case serves to highlight this irony and to reveal its basic flaw.

⁷⁸ See David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, at 570-74.

⁷⁹ While the members of the court disagreed as to the application of the Commerce Clause in *United States v. Lopez*, 514 U.S. —, 115 S. Ct. 1624 (1995), there does not appear to be any division as to the basic importance of the principles of federalism. Quoting from *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), the opinion of the Court states: "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 115 S. Ct. at 1626. In the concurring opinion of Justice Kennedy, with whom Justice O'Connor joined, it is said: "Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. (citations omitted) . . . In the past this Court has participated in maintaining the federal balance through judicial exposition of doctrines such as abstention. . . ." (citations omitted) *Id.*, 115 S. Ct. at 1638-39. In his concurring opinion, Justice Thomas states: "[O]ur cases are quite clear that there are real limits to federal power (citations omitted) . . . Indeed, on this crucial point, the majority and Justice Breyer agree in principle: the Federal Government has nothing approaching a police power." *Id.* at 1642.

5. *This Court Has Previously Recognized An Abstention-Like Doctrine In Insurance And Thrift Insolvencies, Based Upon An Analysis Consistent With The Commissioner's Contentions.*

This Court has previously recognized an abstention-like doctrine applicable to insurance and thrift insolvency proceedings. In these cases the Court recognized the district court's discretion to relinquish jurisdiction after that jurisdiction had been properly invoked.

In *Penn Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935), an action to appoint a receiver and liquidate an insurer was filed in federal district court. Thereafter, an essentially identical action was filed in the Pennsylvania state court. This Court confronted two issues: i) whether the district court had jurisdiction at all; and ii) whether, if it had jurisdiction, it should defer to the state court proceedings.

In a first-step analysis, this Court held that the district court did have subject-matter jurisdiction under its equity jurisdiction and that the court first assuming jurisdiction in an *in rem* or *quasi in rem* action may maintain and exercise that jurisdiction to the exclusion of the other court. *Id.* at 195. This Court then held that since the district court suit was filed first, the district court had the power to retain jurisdiction. *Id.* at 197. Notwithstanding this finding, this Court then concluded that since the "end sought by the liquidation in the state court is the liquidation of a domestic insurance company by a state officer" and since there was no showing that the interests of creditors and shareholders would not be protected by the state court, the case was a "proper one for the district court, in the exercise of judicial discretion, to relinquish the jurisdiction in favor of the administration by the state officer." *Id.* Thus, the Court effectively acknowledged an abstention doctrine applicable to state court insurance insolvency proceedings even prior to the *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), *Younger, Burford* or *Colorado River* decisions.

In a companion case, *Pennsylvania v. Williams*, 294 U.S. 176 (1935), this Court faced substantially the same issues as in *Penn General*, but with respect to receivers of an insolvent building and loan association.⁸⁰ This Court observed that the underlying action to appoint a receiver and liquidate the company was an action in equity and that the district court therefore had the jurisdiction to entertain the suit. *Id.* at 183. The Court also held that, since there were state statutes with elaborate provisions for such a liquidation through the action of a state officer, "the discretion of the district court, *invoked by the petition of the commonwealth*, should have been exercised to relinquish the jurisdiction in favor of the statutory administration of the corporate assets by the state officer." *Id.* at 183 (emphasis added). As shown by the italicized phrase, the trigger to the exercise of the district court's discretion was not the nature of the underlying suit, but the nature of the relief requested by the commonwealth—the motion to relinquish jurisdiction.⁸¹ The jurisdiction of the court was invoked in the first instance by the underlying suit, but the invocation of the court's equity power, jurisdiction having attached, was invoked by the nature of the motion seeking the relinquishment of jurisdiction.

These two cases establish important precedent.⁸² First, they recognize an abstention doctrine applicable to insurance companies and building and loan companies on the grounds that there were comprehensive state court statutory schemes to be administered by a state officer in a state court. Second, though the underlying liquidation proceedings were held to be equitable in nature, that fact

⁸⁰ Building and loan companies, like insurance companies, cannot be debtors in federal bankruptcy proceedings. See 11 U.S.C. § 109(b)(2); *Williams*, 294 U.S. at 179.

⁸¹ The referenced petition of the Commonwealth was a petition for leave to intervene and for an order directing the surrender of the assets of the defendant association to the state secretary of banking.

⁸² See also, *Gordon v. Washington*, 296 U.S. 30 (1935), and *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936).

was key to the analysis of whether the federal court had jurisdiction at all, but *not* to the exercise of the discretion to abstain: "[i]n such circumstances the discretion of the district court, invoked by the petition of the commonwealth [essentially, to abstain], should have been exercised to relinquish the jurisdiction" *Id.* at 183. In other words, jurisdiction having attached, the court may be regarded as *sitting in equity*⁸³ if its equitable powers are invoked by a proper request. This is exactly consistent with the appropriate application of the Rules of Civil Procedure discussed above.

B. The Ninth Circuit Rule Would Undermine Principles Of Federalism.

1. The Abstention Doctrine Should Facilitate The Regulation Of Insurance By The States To Which Congress Has Deferred.

This Court has long acknowledged that the regulation of the business of insurance is within the police power of the states and that government has always had a special relation to insurance.⁸⁴ Congress has the authority to regulate the business of insurance under the Commerce Clause. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).⁸⁵ But, as this Court noted

⁸³ Though Rule 2 created one form of action and abolished any need for making the law/equity distinction in the pleadings, principles of equity are still used in fashioning appropriate relief.

⁸⁴ *United States Dep't of Treasury v. Fabe*, 508 U.S. —, 113 S. Ct. 2202 (1993); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940); *California State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105 (1951); *German Alliance Insurance Co. v. Lewis*, 233 U.S. 389, 411 (1914) ("The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation.").

⁸⁵ In *South-Eastern Underwriters*, this Court emphasized the extreme importance of insurance to the public. In *German Alliance*, 233 U.S. 389, the Court noted: "The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of

in *Fabe*, Congress enacted the McCarran-Ferguson Act, 15 U.S.C. § 1011, in response to *South-Eastern Underwriters*. *Fabe*, 113 S. Ct. 2202. By the McCarran-Ferguson Act, Congress mandated, at Section 1012(b), that:

No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance

Thus, Congress has stayed its hand in the regulation of the business of insurance and deferred to the police power of the states.⁸⁶ The application of judicial federalism through the abstention doctrine should be consistent with Congressional intent where that intent has been made plain. In the area of insurance regulation, Congressional intent to defer to state interests is plain; accordingly, the abstention doctrine should be responsive to this goal.

2. The Ninth Circuit Rule Would Create A Rift In The Application Of Federalism Principles.

In *Fabe*, this Court acknowledged the importance of insurance insolvency proceedings. Unlike *Fabe*, this case involves no Supremacy Clause issue and no issue involving the federal priority statute, 31 U.S.C. § 3713. But, insofar as issues of judicial federalism are concerned, in-

assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility." *German Alliance*, 233 U.S. at 414.

⁸⁶ It is also significant that the Congress has long exempted insurance companies from the Bankruptcy Act and now the Bankruptcy Code. Under Sections 109(b)(2) and (d) of that Code, insurers may not be debtors under federal bankruptcy laws. These cases are to proceed in state courts even where there is a competing bankruptcy matter. *In the matter of Equity Funding Corp.*, 396 F. Supp. 1266 (C.D. Cal. 1975); *Baldwin-United Corp. v. Garner*, 283 Ark. 385, 678 S.W. 2d 754 (1984), cert. denied, 471 U.S. 1111 (1985).

insurance insolvency proceedings are intimately connected with the regulation of the insurance industry. Such regulation is traditionally a state enclave and Congress has gone to some length to have it remain so even in the wake of this Court's decision in *South-Eastern Underwriters*, 322 U.S. 533.⁸⁷

Under the Ninth Circuit's rule, the equity/law dichotomy would trump principles of federalism, even in insurance insolvency proceedings, and would establish the rule that the federal courts have no power to protect these principles through the application of the abstention doctrine in cases sounding in law.⁸⁸

3. The Abstention Doctrines Promote Federalism.

The opinion below would require a district court to turn its face from judicial federalism in any action "at law" even where "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern," and where assumption of jurisdiction in the federal court would disrupt ongoing state proceedings.⁸⁹ This view ignores the reality—recognized by this Court in other decisions—that a case not sounding purely in equity can be one calling for abstention. This Court should not approve a rule holding that federal district courts can never exercise their sound

⁸⁷ The McCarran Act was one factor in prompting the Court to abstain in *Colorado River*. The principles behind the McCarran-Ferguson Act are very similar to those behind the McCarran Act.

⁸⁸ This would be singularly inappropriate where important state interests are concerned. See e.g., Gordon Young, *Federal Court Abstention and State Administrative Laws from Burford to Ankenbrandt: 50 Years of Judicial Federalism Under Burford v. Sun Oil Co., and Kindred Doctrines*, 42 De Paul L. Rev. 859, 945 (1993).

⁸⁹ See *NOPSI*, 491 U.S. at 361 (quoting *Colorado River*, 424 U.S. at 814).

discretion to apply principles of federalism through the abstention doctrine unless the underlying case would have sounded in equity under the equity/law dichotomy.

4. Application Of The Ninth Circuit Rule In The Instant Case Is Disruptive Of Important State Interests and Interferes With California's Statutory Scheme.

California's Insurance Code establishes an integrated matrix that would be severely disrupted if vital aspects, such as the conduct of liquidation proceedings and claims processes, are undermined by being subjected to multiple litigation in multiple jurisdictions with varying interpretations of California law and policy.⁹⁰

The basic purpose of state regulation of insurers is to see that an efficacious insurance product is delivered to the public. To serve the public interest, "insurance" must truly be "insurance" and state governments must be permitted to regulate insurance and reinsurance contracts so that they will be effective if the risk insured against is realized. Not only is the basic financial health of individuals and businesses at stake, but so is the confidence of the entire public.⁹¹ Common sense, and a significant number of judicial decisions, strongly support the view that special circumstances supporting abstention are very likely to exist in matters affecting insurance insolvency proceedings.⁹²

⁹⁰ Permitting the repetition of a suit such as that in *Fair Assessment* against this Country's insurance regulators with no possibility of abstention would have a deep and dangerous chilling effect on insurance regulation.

⁹¹ *In re Integrity*, 573 A.2d 928, 240 N.J. Super. 480 (Super. Ct. 1990); *In re Executive Life Ins. Co.*, 32 Cal. App. 4th, 344, 375-76, 38 Cal. Rptr. 2d 453, 471, rev. denied (1995); *South-Eastern Underwriters*, 322 U.S. 533.

⁹² See, e.g., *Penn Gen.*, 294 U.S. 189, 196; *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936); *Princess Lida v. Thompson*, 305 U.S. 456 (1939); *Lion Bonding Sur. Co. v. Karatz*, 262 U.S. 77 (1923); see also note 37 *supra*.

It should also be noted that one of the effects of California's statutes, and the terms of the reinsurance agreements themselves, is to transform these contracts from commercial agreements between private parties to regulatory agreements with a state official. *Corcoran v. Ardra Ins. Co., Ltd.*, 657 F. Supp. 1223, 1232 n.6 (S.D.N.Y. 1987). These reinsurance agreements are not merely private contracts, but are subject to the control of the state. See, e.g., *Osborn*, 310 U.S. 53; *Maloney*, 341 U.S. 105. Under California law, Allstate and all others contracting with insurers are deemed to have knowledge of the law and the terms of relevant law and regulations are deemed to be a part of their agreements. *Alpha Beta Food Mkts., Inc. v. Retail Clerk's Union*, 45 Cal. 2d 764, 291 P.2d 433 (1955). When Allstate entered into the reinsurance agreements, it knew it acted in a highly regulated industry. It also knew that the very solvency of the Mission Companies depended upon the performance of its reinsurers, that there were statutory provisions governing the Mission Companies' reinsurance agreements and the Reinsurance Recoverables, and that if the Mission Companies became insolvent, they would be placed into state court insolvency proceedings and that Allstate would be subjected to the state statutory insolvency scheme.⁹³ Allstate contracted with knowledge of all these factors, but now Allstate wishes to have nothing to do with the Commissioner or the Receivership Court.

⁹³ Allstate's reinsurance agreements contain what is known as an "insolvency clause." See, e.g., Jt. App. p. 109-110. In pertinent part this clause is mandated by Cal. Ins. Code § 922.2 and provides: "In the event of insolvency and the appointment of a conservator, liquidator or statutory successor of the ceding company, [the Reinsurance Recoverables] shall be payable to such conservator, liquidator or statutory successor immediately upon demand, with reasonable provision for verification . . . without diminution because of such insolvency or because such conservator, liquidator or statutory successor has failed to pay all or a portion of any claims." (Pet. App. D). In the face of these provisions, Allstate cannot in good faith assert that it did not expect at the time of contracting to be brought into any subsequent state court insolvency proceedings involving the Mission Companies.

Whether the district court was right or wrong in abstaining is not *per se* before this Court. However, it is necessary to focus on the many compelling circumstances that *could* motivate a district court to abstain—and certainly did play a role in this very case—if not prevented from even considering the issue by the decision below. If this Court permits the decision below to stand, then it will force federal courts to ignore cases that present compelling circumstances for abstention unless they first find the underlying matter is purely “in equity.” There is no good reason to force the district courts into such straitjackets or to subject state regulators to such an arcane process. There is nothing to commend the imposition of such burdens upon the federal and state systems and there are very good reasons to condemn it.

CONCLUSION

For the reasons discussed above, the judgment below should be reversed and the case remanded with appropriate directions.

Respectfully submitted,

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APPENDIX

APPENDIX A

Rule 2. One Form of Action

There shall be one form of action to be known as "civil action".

Rule 8.

* * * *

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.

* * * *

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.

* * * *

Rule 54.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

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QUESTIONS PRESENTED

1. Whether an order remanding a case to state court based on *Burford* abstention is reviewable by appeal and not merely by mandamus.

2. Whether an action at law against a private party seeking money damages can present the exceptional circumstances necessary for a federal court to decline to exercise its jurisdiction based on the *Burford* doctrine.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The names of all parties in this Court and in the United States Court of Appeals for the Ninth Circuit are contained in the caption.

Respondent is a wholly-owned subsidiary of The Allstate Corporation, a publicly traded corporation. Respondent's non-wholly owned subsidiaries are After Six Holding Corporation, Allstate Automobile & Fire Insurance Company Limited, Gainey Ranch Financial Class A L.P., Saison Life Insurance Company, Ltd., Samshin Allstate Life Insurance Company, Ltd., Saugatuck II Cellular Investment Corp., and Tramed.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	i
LIST OF PARTIES AND RULE 29.6 STATEMENT...	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE.....	2
A. Statutory Procedures for Insurance Liquidations.....	3
1. The Collection and Management Function	4
2. The Claim-Processing Function	5
B. The Mission Liquidation.....	5
C. The Suit Against Allstate	7
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. THE DISTRICT COURT'S ORDER REMANDING THE CASE TO STATE COURT WAS REVIEWABLE ON APPEAL	13

A.	The District Court's Remand Order Was Appealable as a Final Decision Under 28 U.S.C. § 1291	14
B.	Even If the District Court's Remand Order Were Not Final in the Usual Sense, It Would Be Appealable as a Final Collateral Order ..	21
II.	THE EXTRAORDINARY CIRCUMSTANCES JUSTIFYING <i>BURFORD</i> ABSTENTION CANNOT ARISE IN AN ACTION AT LAW ON A CONTRACT	24
A.	The <i>Burford</i> Doctrine Applies Only to Actions Seeking to Review State Administrative Proceedings Where Such Review Would Interfere with State Policymaking Processes On Matters of Distinctively Local Concern .	26
1.	The District Court Had No Discretion to Abstain Because Allstate Sought No Injunctive Relief.....	30
2.	The District Court Had No Discretion to Abstain Because Allstate Did Not Seek to Interfere with State Policymaking	36
B.	Neither of the Interests the Liquidator Asserts Here May Defeat Allstate's Right to Invoke the District Court's Diversity Jurisdiction	39

1.	The Liquidator's Preference for Consolidated Litigation Cannot Defeat Allstate's Right to Invoke Diversity Jurisdiction	40
2.	The Presence of State-Law Issues Cannot Defeat Allstate's Right to Invoke Diversity Jurisdiction	45
C.	The District Court Had No Discretion to Abstain in the Face of Allstate's Motion to Compel Arbitration Under the Federal Arbitration Act.....	48
	CONCLUSION.....	50
	APPENDIX.....	1a

TABLE OF AUTHORITIES

Cases	PAGE
<i>Ainsworth v. Allstate Insurance Co.</i> , 634 F. Supp. 52 (W.D. Mo. 1985).....	48
<i>Alabama Public Service Commission v. Southern Railway Co.</i> , 341 U.S. 341 (1951).....	27, 29
<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 115 S. Ct. 834 (1995)	13, 49, 50
<i>Anderson v. Great Republic Life Insurance Co.</i> , 41 Cal. App. 2d 181, 106 P.2d 75 (1940)	37
<i>Angoff v. Holland-American Ins. Co. Trust</i> , No. CV87- 4356 (Mo. Cir. Ct., Jackson Co., May 11, 1995) ..	3
<i>Ankenbrandt v. Richards</i> , 504 U.S. 689 (1992).....	33, 35
<i>Bank of Bethel v. Pahquioque Bank</i> , 14 Wall. (81 U.S.) 383 (1872)	42, 44
<i>Ex parte Bradstreet</i> , 7 Pet. (32 U.S.) 634 (1833).....	18, 19
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943) .9, 10, 25, 26, 27	
<i>Carnegie-Mellon University v. Cohill</i> , 484 U.S. 343 (1988)	15, 17
<i>Catlin v. United States</i> , 324 U.S. 229 (1945)	15
<i>Clay v. Sun Insurance Office</i> , 363 U.S. 207 (1960) ...	32
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949)	11, 14, 21
<i>Cohens v. Virginia</i> , 6 Wheat. (19 U.S.) 264 (1821)....	25
<i>Coit Independence Joint Venture v. FSLIC</i> , 489 U.S. 561 (1989)	12, 42, 44

<i>Colonial American Life Insurance Co. v. Commissioner of Internal Revenue</i> , 491 U.S. 244 (1989)	6
<i>Colorado River Water Conservation District v. United States</i> , 424 U.S. 800 (1976).....	16, 25, 28, 29, 34, 47
<i>Commonwealth Trust Co. v. Bradford</i> , 297 U.S. 613 (1936)	44, 45
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 468 (1978)...	21
<i>Corcoran v. Ardra Insurance Co.</i> , 842 F.2d 31 (2d Cir. 1988).....	20, 23
<i>Corcoran v. National Union Fire Insurance Co.</i> , 143 A.D. 2d 309, 532 N.Y.S.2d 376 (1988)	37
<i>Costle v. Fremont Indemnity Co.</i> , 839 F. Supp. 265 (D. Vt. 1993).....	30
<i>County of Allegheny v. Frank Mashuda Co.</i> , 360 U.S. 185 (1959)	25, 33
<i>Crawford v. Employers Reinsurance Co.</i> , 896 F. Supp. 1101 (W.D. Okla. 1995).....	37
<i>Dean Witter Reynolds Inc. v. Byrd</i> , 470 U.S. 213 (1985)	49
<i>Digital Equipment Corp. v. Desktop Direct, Inc.</i> , 114 S. Ct. 1992 (1994).....	15, 21, 23, 24
<i>Donovan v. City of Dallas</i> , 377 U.S. 408 (1964)	40
<i>Doughty v. Underwriters at Lloyd's, London</i> , 6 F.3d 856 (1st Cir. 1993)	23

<i>Duane v. Government Employees Insurance Co.</i> , 784 F. Supp. 1209 (D. Md. 1992), <i>aff'd</i> , 37 F.3d 1036 (4th Cir. 1994), <i>cert. granted</i> , 115 S. Ct. 1251, <i>cert. dismissed</i> , 115 S. Ct. 2272 (1995)	30
<i>Eagle Life Insurance Co. v. Hernandez</i> , 743 S.W.2d 671 (Tex. App. 1987)	37
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938)	46
<i>Fabe v. Columbus Insurance Co.</i> , 68 Ohio App. 3d 226, 587 N.E.2d 966 (1990)	41
<i>Fair Assessment in Real Estate Association v. McNary</i> , 454 U.S. 100 (1981)	33, 34, 35
<i>Fornaris v. Ridge Tool Co.</i> , 400 U.S. 41 (1970)	32
<i>Foster v. Chesapeake Insurance Co.</i> , 933 F.2d 1207 (3rd Cir. 1993)	21
<i>Fragoso v. Lopez</i> , 991 F.2d 878 (1st Cir. 1993)	30, 39
<i>Garamendi v. Caldwell</i> , [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,861 (C.D. Cal. 1992) ...	41
<i>General Atomic Co. v. Felter</i> , 434 U.S. 12 (1977)	40
<i>Gillespie v. Waite-Hill Assurance, Ltd.</i> , No. 87-08504 RMT (Kx) (C.D. Cal. 1987)	41
<i>Grode v. Mutual Fire, Marine & Inland Insurance Co.</i> , 8 F.3d 953 (3rd Cir. 1994)	34, 46
<i>Grove v. Emison</i> , 113 S. Ct. 1075 (1993)	32
<i>Gulfstream Aerospace Corp. v. Mayacamas Corp.</i> , 485 U.S. 271 (1988)	20
<i>H.D. Roosen Co. v. Pacific Radio Publishing Co.</i> , 123 Cal. App. 525, 11 P.2d 873 (1932)	50

<i>Harrington v. Haller</i> , 111 U.S. 796 (1884)	19
<i>Harrison v. St. Louis & S.F.R. Co.</i> , 232 U.S. 318 (1914)	40
<i>Hawaii Housing Authority v. Midkiff</i> , 467 U.S. 229 (1984)	25
<i>Helvering v. Therrell</i> , 303 U.S. 218 (1938)	37
<i>Idlewild Bon Voyage Liquor Corp. v. Epstein</i> , 370 U.S. 713 (1962)	16
<i>Insurance Co. v. Comstock</i> , 16 Wall. (83 U.S.) 258 (1872)	18, 19
<i>Johnson v. Jones</i> , 115 S. Ct. 2151 (1995)	22
<i>Karl Koch Erecting Co. v. New York Convention Center Development Corp.</i> , 838 F.2d 656 (2nd Cir. 1988)	21
<i>Kentucky v. Dennison</i> , 24 How. (65 U.S.) 66 (1860)	19
<i>Kinder v. Superior Court (Market Insurance Corp.)</i> , 78 Cal. App. 3d 574, 144 Cal. Rptr. 291 (1978) ..	36, 43
<i>The King v. Justices of Gloucestershire</i> , 1 B. & A. 1, 109 Eng. Rep. 688 (K.B. 1830)	18
<i>Matter of Kinney (Miller)</i> , 257 A.D. 496, 14 N.Y.S.2d 11, <i>aff'd</i> , 281 N.Y. 840, 24 N.E.2d 494 (1939) ...	37
<i>Kline v. Burke Construction Co.</i> , 260 U.S. 226 (1922)	13, 24, 43
<i>Langnes v. Green</i> , 282 U.S. 531 (1931)	34
<i>Louisiana Power & Light Co. v. City of Thibodaux</i> , 360 U.S. 25 (1959)	32, 33, 35

	PAGE
<i>Lumbermen's Mutual Casualty Co. v. Elbert</i> , 348 U.S. 48 (1954).....	27, 28, 39
<i>Maloney v. Rhode Island Insurance Co.</i> , 115 Cal. App. 2d 238, 251 P.2d 1027 (1953).....	36
<i>Markham v. Allen</i> , 326 U.S. 490 (1946)	44
<i>Martin v. Wilks</i> , 490 U.S. 755 (1989).....	40
<i>Mastrobuono v. Shearson Lehman Hutton, Inc.</i> , 115 S. Ct. 1212 (1995)	48
<i>McDermott International, Inc. v. Lloyd's Underwriters of London</i> , 944 F.2d 1199 (5th Cir. 1991)	21, 23
<i>McNeese v. Board of Education</i> , 373 U.S. 668 (1963).	46
<i>Meredith v. City of Winter Haven</i> , 320 U.S. 228 (1943)	12, 46
<i>Midland Asphalt Corp. v. United States</i> , 489 U.S. 794 (1989)	21
<i>Milk 'N' More, Inc. v. Beavert</i> , 963 F.2d 1342 (10th Cir. 1992)	22
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	48
<i>Morris v. Jones</i> , 329 U.S. 545 (1947)	12, 42, 43, 44, 45
<i>Moses H. Cone Memorial Hospital v. Mercury Construction Corp.</i> , 460 U.S. 1 (1983).....	passim
<i>Nassau Square Associates v. Insurance Commissioner of California</i> , 579 So. 2d 259 (Fla. App. 1991) ..	42
<i>New Orleans Public Service Inc. v. Council of City of New Orleans (NOPSI)</i> , 491 U.S. 350 (1989)	passim

	PAGE
<i>Ex parte Newman</i> , 14 Wall. (81 U.S.) 152 (1872)	18
<i>North River Insurance Co. v. Allstate Insurance Co.</i> , 866 F. Supp. 123 (S.D.N.Y. 1994)	48
<i>Oakbrooke Associates, Ltd. v. Insurance Commissioner of California</i> , 581 So. 2d 943 (Fla. App. 1991) ..	41
<i>Ex parte Parker</i> , 120 U.S. 737 (1887)	18
<i>Parker, petitioner</i> , 131 U.S. 221 (1889)	18
<i>Pelleport Investors v. Budco Quality Theatres</i> , 741 F.2d 273 (9th Cir. 1984)	22
<i>Penn General Casualty Co. v. Pennsylvania ex rel. Schnader</i> , 294 U.S. 189 (1935).....	40, 43, 44, 45
<i>In re Pennsylvania Co.</i> , 137 U.S. 451 (1890).....	18
<i>Pennsylvania v. Williams</i> , 294 U.S. 176 (1935) ...	40, 44, 45
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987).....	50
<i>Prima Paint Corp. v. Flood & Conklin Manufacturing Co.</i> , 388 U.S. 395 (1967)	48
<i>Princess Lida v. Thompson</i> , 305 U.S. 456 (1938)	44
<i>Propper v. Clark</i> , 337 U.S. 472 (1948)	46
<i>Prudential Reinsurance v. Superior Court (Garamendi)</i> . 3 Cal.4th 1118, 842 P.2d 48, 14 Cal. Rptr. 749 (Cal. 1992)	4, 38, 46, 47, 49
<i>Railroad Co. v. Wiswall</i> , 23 Wall. (90 U.S.) 507 (1875).....	17, 18, 19, 20
<i>Railroad Commission v. Pullman</i> , 312 U.S. 496 (1941)	16, 32

	PAGE
<i>Regis Associates v. Rank Hotels (Management) Ltd.</i> , 894 F.2d 193 (6th Cir. 1990).....	22
<i>Riehle v. Margolies</i> , 279 U.S. 218 (1929)	42, 44
<i>Rosenberg Brothers & Co. v. Curtis Brown Co.</i> , 260 U.S. 516 (1923).....	14, 20
<i>Ex parte Russell</i> , 13 Wall. (80 U.S.) 664 (1871)	18, 19
<i>Salve Regina College v. Russell</i> , 499 U.S. 225 (1991)	46
<i>Ex parte Schollenberger</i> , 96 U.S. 369 (1878)	19
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984).....	50
<i>Sowell v. Federal Reserve Bank</i> , 268 U.S. 449 (1925)	43
<i>Stainback v. Mo Hock Ke Lok Po</i> , 336 U.S. 368 (1949)	31
<i>Taylor v. Freeland & Kronz</i> , 503 U.S. 638 (1992).....	35
<i>Texas Commerce Bank-El Paso v. Garamendi</i> , 28 Cal. App. 4th 1234, 34 Cal. Rptr. 2d 155 (1994) ..	37, 38, 49
<i>Thermtron Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336 (1976)	10, 13, 17, 18, 20, 21
<i>Things Remembered, Inc. v. Petrarca</i> , 64 U.S.L.W. 4035 (1995)	10, 14
<i>Todd v. DSN Dealer Service Network, Inc.</i> , 861 F. Supp. 1531 (D. Kan. 1994)	30
<i>Travelers Insurance Co. v. Keeling</i> , 996 F.2d 1485 (2d Cir. 1993)	23
<i>Tribune Co. v. Abiola</i> , 66 F.3d 12 (2d Cir. 1995).....	30, 39

	PAGE
<i>Underwriters National Assurance Corp. v. North Carolina Life Insurance Guarantee Association</i> , 455 U.S. 691 (1982)	40
<i>United Gas Pipe Line Co. v. Ideal Cement Co.</i> , 369 U.S. 134 (1962)	32
<i>United Labor Life Insurance Co. v. Pireno</i> , 458 U.S. 119 (1982).....	35
<i>United States v. Bank of New York & Trust Co.</i> , 296 U.S. 463 (1935)	43, 44
<i>United States v. Klein</i> , 303 U.S. 276 (1938)	42
<i>United States Department of Treasury v. Fabe</i> , 113 S. Ct. 2202 (1993).....	35
<i>Universal Reinsurance Corp. v. Allstate Insurance Co.</i> , 16 F.3d 125 (7th Cir. 1994).....	48
<i>University of Maryland v. Peat Marwick Main & Co.</i> , 923 F.2d 265 (3d Cir. 1991).....	30
<i>Waco v. United States Fidelity & Guaranty Co.</i> , 293 U.S. 140 (1935)	15
<i>Webster v. Superior Court (Gillespie)</i> , 46 Cal. 3d 338, 758 P.2d 596, 250 Cal. Rptr. 268 (1988).....	41
<i>Weinberger v. Romero-Barcelo</i> , 456 U.S. 305 (1982) .	29
<i>Wilton v. Seven Falls Corp.</i> , 115 S. Ct. 2137 (1995) ..	31
Statutes	
Federal Arbitration Act, 9 U.S.C. §§ 1-16	8, 9, 16, 23, 25, 30, 46, 48, 49, 50
McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015	34, 35, 50

	PAGE
28 U.S.C. § 1291.....	10, 11, 13, 14, 15, 17, 20, 21, 22
28 U.S.C. § 1292(a)(1).....	20
28 U.S.C. § 1331.....	8
28 U.S.C. § 1332.....	8, 10, 24, 30
28 U.S.C. § 1441.....	24, 30
28 U.S.C. § 1441(c) (1988 ed.).....	8
28 U.S.C. § 1447.....	10, 11, 13, 14, 17
28 U.S.C. § 2072(b).....	31
28 U.S.C. § 2201.....	31
42 U.S.C. § 1983.....	33
43 U.S.C. § 666.....	34
Cal. Code Civ. Proc. §§ 22-23.....	36
Cal. Ins. Code §§ 1010-1062.....	36, 37
Cal. Ins. Code § 1011.....	3
Cal. Ins. Code § 1016.....	3
Cal. Ins. Code § 1021.....	5
Cal. Ins. Code § 1031.....	4, 8, 34, 46
Cal. Ins. Code § 1032.....	5
Cal. Ins. Code § 1033.....	5, 38
Cal. Ins. Code § 1035.....	4, 38
Cal. Ins. Code § 1035.5.....	5
Cal. Ins. Code § 1037.....	4, 36, 41
Cal. Ins. Code § 1057.....	3, 37

	PAGE
Cal. Ins. Code § 1058.....	41
Cal. Ins. Code §§ 1063-1063.15.....	5
Cal. Ins. Code §§ 1064.1-1064.12.....	3, 4, 42
Cal. Ins. Code § 1125, added by Act of Oct. 12, 1995, ch. 843, § 1, 1995 Cal. Adv. Legis. Serv. 4994, 4995-5006 (West).....	3
Uniform Insurers Liquidation Act, 13 U.L.A. 321 (1986).....	3, 42
Other Authorities	
Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty §§ 10-8, 10-17.....	34
Ronald A. Jacks, Arbitration and Insurer Insolvencies, in ABA, Law and Practice of Insurance Company Insolvency 260 (1986).....	48
Henry T. Kramer, The Nature of Reinsurance 4-6, in Reinsurance (Robert W. Strain ed. 1980).....	6
P. Phillips, The Statutory Jurisdiction and Practice of the Supreme Court of the United States 276 (2d ed. 1872).....	18, 19
Prefatory Notes to Uniform Insurers Liquidation Act, 13 U.L.A. 321 (1986).....	4, 42
David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 570-77 (1985).....	25
Richard R. Spencer, Jr., Obligations of Guarantee Associations, in ABA, Law and Practice of Insurance Company Insolvency Revisited 535 (1989).....	5

	PAGE
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Edson R. Sunderland, The Problem of Appellate Review, 5 Tex. L. Rev. 126, 129-130 (1927)	19
Wright, Miller & Cooper, Federal Practice and Procedure § 3914.11 (2d ed. 1992)	20

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-244

CHUCK QUACKENBUSH, Insurance Commissioner of the State
of California, in His Capacity as Liquidator and Trustee of
the Mission Insurance Company Trust, Mission National
Insurance Company Trust, Enterprise Insurance Company
Trust, Holland-America Insurance Company Trust and
Mission Reinsurance Corporation Trust,

Petitioner,

—v.—

ALLSTATE INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

Respondent Allstate Insurance Company submits this brief
to urge affirmance of the judgment below.

OPINIONS BELOW

The order of the District Court remanding the case to state
court (Pet. App. 13a-34a) is unpublished. The order of the
Court of Appeals denying petitioner's motion to dismiss the

appeal (Br. Opp. Pet. App. 1a-2a) is unpublished. The opinion of the Court of Appeals on appellate jurisdiction and the merits (Pet. App. 1a-12a) is reported at 47 F.3d 350. The order of the Court of Appeals denying rehearing (Pet. App. 35a-37a) is unpublished.

STATUTES INVOLVED

The federal statutes involved in this case are the provisions of the Judicial Code governing diversity and removal jurisdiction, 28 U.S.C. §§ 1332(a), 1441(a) (Pet. App. 115a); the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (Br. Opp. Pet. App. 4a-12a); and the provision governing appeals from final decisions of the District Courts, 28 U.S.C. § 1291 (App. 1a hereto). The state statutes involved are Article 14 of the California Insurance Code, governing Proceedings in Cases of Insolvency and Delinquency, Cal. Ins. Code §§ 1010-1062 (Pet. App. 59a-86a); and Article 14.3 of the California Insurance Code, which is known as the Uniform Insurers Rehabilitation (or Liquidation) Act, Cal. Ins. Code §§ 1064.1-1064.12 (Pet. App. 105a-114a).

STATEMENT OF THE CASE

This is a civil action for money damages commenced by petitioner, the California Insurance Commissioner acting as Liquidator and Trustee for the Mission group of insurance companies (the "Liquidator"), against respondent Allstate Insurance Company ("Allstate"). J.A. 35-61. The Mission companies (collectively, "Mission") had previously been placed in conservatorship and later in liquidation on grounds of their hazardous financial condition. Pet. App. 116a-121a; J.A. 8-34.

A. Statutory Procedures for Insurance Liquidations.

Under California law, when an insurer doing business within the state becomes insolvent, the Insurance Commissioner may apply to the Superior Court for an order authorizing the Commissioner, as conservator, to take possession of the insurer's books and property and to conduct its business. Cal. Ins. Code §§ 1011, 1064.2(c). If efforts to rehabilitate the company would be futile, the Commissioner may apply to the court for an order authorizing him or her to liquidate and wind up the insurer's business. *Id.* § 1016. An order appointing the Commissioner as conservator or liquidator of an insolvent insurer vests in the Commissioner title to all the insurer's assets. *Id.* §§ 1011, 1064.2(a)-(b). In that capacity, he or she is "deemed to be a trustee for the benefit of all creditors and other persons interested in the estate" of the insolvent insurer. *Id.* § 1057.

Because most insurance companies do business in more than one state, they can be subject to multiple receiverships. Under the Uniform Insurers Liquidation Act (the "Uniform Act"), 13 U.L.A. 321 (1986), enacted in California as Cal. Ins. Code §§ 1064.1-1064.12, the receiver in the state where the insolvent insurer is domiciled takes title to the insurer's assets wherever located. *Id.* §§ 1064.2(b), 1064.3(b).¹

¹ The term "receiver" is used to refer to conservators, rehabilitators and liquidators generically. See Cal. Ins. Code § 1064.1(k). Under the Uniform Act, receivers appointed in states other than the state of domicile perform certain functions as "ancillary receivers" with respect to assets and claimants located in their respective states. Cal. Ins. Code §§ 1064.2(b), 1064.3(b). See also Cal. Ins. Code § 1125, added by Act of Oct. 12, 1995, ch. 843, § 1, 1995 Cal. Adv. Legis. Serv. 4994, 4995-5006 (West) (enacting Interstate Insurance Receivership Compact). Indeed, it appears that the Liquidator serves as ancillary receiver of Holland-America Insurance Company, one of the entities on whose behalf he brings this action, as that company was a Missouri corporation, J.A. 8, 23, and *amicus* Missouri Director of Insurance serves as domiciliary liquidator. *Angoff v. Holland-America Ins. Co. Trust*, Notice of Order, No. CV87-4356 (Mo. Cir. Ct., Jackson Co., May 11, 1995).

1. The Collection and Management Function.

The Commissioner, as conservator or liquidator of an insolvent insurer, is responsible for conserving the insurer's assets and conducting its business and affairs. Cal. Ins. Code §§ 1037(a), 1064.2(c). To assist in that task, the Commissioner is specifically authorized to hire special deputies, counsel, clerks and assistants, all of whom are paid out of the assets of the insolvent insurer, and to delegate to them such powers as he or she deems necessary. *Id.* §§ 1035, 1064.2(c).

The conservator or liquidator is required to collect all debts due and claims belonging to the insurer, *id.* § 1037(b), but has the authority to settle claims "upon such terms and conditions as the commissioner shall deem to be most advantageous to the estate of the person being administered or liquidated," *id.* § 1037(c). With respect to such debts and claims, the California Insurance Code codifies and preserves the right of setoff, *i.e.*, the principle that a party owing money to an insolvent entity may ordinarily deduct from the debt any amount that the insolvent entity owes that party. *Id.* § 1031.²

For the purpose of collecting debts and performing his or her other duties, the conservator or liquidator is empowered to "prosecute and defend any and all suits and other legal proceedings" involving the insolvent insurer. *Id.* § 1037(f). Under the Uniform Act, the liquidator or conservator from an insolvent insurer's state of domicile may sue on behalf of the insurer in the courts of any state. *See id.* §§ 1064.2(b), 1064.3(b), 1064.10; Prefatory Note, 13 U.L.A. at 323.

² The California Supreme Court explained in *Prudential Reinsurance v. Superior Court (Garamendi)*, 3 Cal.4th 1118, 1142, 842 P.2d 48, 63, 14 Cal. Rptr. 749, 764 (1992), that "[o]ffsetting debts not only spreads risk but also acts as mutual security for performance," thus enhancing the ability of smaller insurers, in particular, to survive and compete.

2. The Claim-Processing Function.

Besides managing the insolvent insurer's assets and collecting debts owed to it, the other principal statutory function of a liquidator is to process and pay claims of the insurer's creditors. Creditors of the insurer are sent notice and have six months to file proofs of claim with the liquidator. Cal. Ins. Code § 1021(a). If the liquidator rejects a claim, the claimant may apply to the court for allowance of the claim. *Id.* § 1032. Funds from the insolvent insurer's estate are distributed to the creditors of the estate according to priorities established by statute. *Id.* § 1033. General creditors' claims are subordinated by statute to policyholder and guarantee association claims. *Id.* § 1033(a)(6).³

B. The Mission Liquidation.

On November 26, 1985, the California Insurance Commissioner obtained orders from the Superior Court in Los Angeles placing Mission Insurance Company and four of its affiliates in conservatorship. Pet. App. 116a-118a, J.A. 8-19.

³ In a liquidation, most policyholder claims against an insolvent insurer are paid not by the insolvent insurer itself but are covered by the California Insurance Guarantee Association, *see* Cal. Ins. Code §§ 1063-1063.15, and similar guarantee associations in other states. *See generally* Richard R. Spencer, Jr., *Obligations of Guarantee Associations*, in ABA, *Law and Practice of Insurance Company Insolvency Revisited* 535 (1989). With respect to a "covered claim," *see* Cal. Ins. Code § 1063.1(c), the Guarantee Association assumes the insolvent insurer's duties under the insurance policy. *Id.* § 1063.2. The Association then is deemed to be an assignee of the policyholder's rights against the insolvent insurer, *id.* § 1063.4(b), and its claims (and claims of similar associations in other states) have equal priority with policyholders' uncovered claims, *id.* § 1033(a)(5). The liquidation statute provides the various state guarantee associations early access to their expected share of the insolvent insurer's estate. *Id.* § 1035.5(a). The Guarantee Association obtains funds by assessing premiums against its members, *id.* § 1063.5, which consist of the insurance companies licensed to do business in the state, *id.* § 1063(a).

On February 24, 1987, the same court issued liquidation orders for these companies. Pet. App. 119a, 121a, J.A. 23-34.⁴

In the Mission conservation and liquidation proceedings, the Liquidator has requested and obtained at least eleven separate orders from the California Superior Court expressly authorizing him "to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his functions as Liquidator [or Conservator]." Pet. App. 118a, 121a; J.A. 10, 13, 16, 19, 22, 25, 28, 31, 34 (emphasis added). Those orders also state that all persons are enjoined from, among other things, interfering with the "possession, title and rights" of the Liquidator "in and to the assets of Respondent," and from "instituting or prosecuting any action or proceeding against" the Mission companies or their Liquidator without the consent of the court. Pet. App. 117a, 120a; J.A. 9, 12, 15, 18, 24, 27, 30, 33.

Pursuant to the liquidation orders, the Liquidator commenced the winding up of the Mission companies' business. Allstate has filed claims with the Liquidator for amounts the Mission companies owed it under various reinsurance contracts.⁵

⁴ The Liquidator improperly includes in his Statement of the Case numerous allegations of fact that have no support in the record, including the repeated charge that Mission's reinsurers caused its insolvency. That allegation is irrelevant to the issues before the Court; in any event, if made against Allstate, it would be vigorously denied. See Subcomm. on Oversight & Investigations of House Comm. on Energy & Commerce, *Failed Promises: Insurance Company Insolvencies*, Committee Print 101-P, 101st Cong., 2d Sess., 11-19 (1990) (Mission's insolvency is "tale of reckless and incompetent management").

⁵ Reinsurance is insurance for insurance companies. Reinsurance permits an insurer to spread its insurance risk by assigning (or "ceding") portions of the risk to other insurance companies acting as reinsurers in exchange for a share of the premiums. See generally *Colonial Am. Life Ins. Co. v. Commissioner of Internal Revenue*, 491 U.S. 244, 246-247 (1989); Henry T. Kramer, *The Nature of Reinsurance* 4-6, in *Reinsurance* (Robert W. Strain ed. 1980). As is common in the industry, Mission both

C. The Suit Against Allstate

On February 9, 1990, the Liquidator filed the present suit against Allstate in the California Superior Court for Los Angeles County. J.A. 35-61. The complaint includes two counts: for damages for alleged breach of certain reinsurance contracts, and for a declaratory judgment that Allstate is obligated to "pay or make provision to pay" the money allegedly owed under those contracts. J.A. 51-53.⁶

The Liquidator's claims against Allstate arise under several thousand separate reinsurance contracts entered into between Allstate and some of the Mission companies between 1961 and 1985. J.A. 98. Virtually all of these reinsurance contracts contain agreements providing that disputes arising under the contracts shall be settled by arbitration.⁷

provided reinsurance to other companies and sought reinsurance for its own obligations. Pet'r Br. 2, 5, 10 & n.25, 12 & n.30. Allstate notes that the two proofs of claim seeking "contingent and undetermined" amounts included in the Joint Appendix, J.A. 153-164, were not part of the record in the District Court, were attached to the Liquidator's Petition for Rehearing in the Court of Appeals over Allstate's objection, J.A. 177 n.4, and have since been superseded in the liquidation proceeding.

⁶ The complaint also asserts the same claims against 19 other named reinsurers and 1000 alleged reinsurers denominated "Does 1 through 1000." J.A. 51-53. It asserts tort claims against "Does 500 through 1000," but not against any named defendants. J.A. 53-59. Together with the Complaint, the Liquidator filed a Notice of Related Cases, seeking to have this suit assigned to Judge Kurt J. Lewin, to whom the Mission liquidation proceeding, as well as an earlier suit against a number of Mission's reinsurers, had been assigned. J.A. 62-63.

⁷ Reinsurance "treaties" cover large classes of business; "facultative certificates" cover single risks. Clauses providing for binding arbitration are contained in each of the approximately 26 treaties ceding risks from Mission to Allstate, and each of the approximately 41 treaties ceding risks from Allstate to Mission. J.A. 97-98. The remaining contracts at issue are facultative certificates, almost all of which also contain agreements for binding arbitration. J.A. 97, 99.

Allstate has served no answer in the action and therefore has not had occasion to state its defenses. Allstate believes that approximately \$7 million in reinsurance balances is claimed by Mission under the contracts, subject to the defenses and setoffs that Allstate may assert. Allstate disputes the validity of these claims and intends to assert, among other defenses, that it is entitled to set off against these claims approximately \$24 million in reinsurance balances that is due to Allstate from Mission as Allstate's reinsurer under other contracts. Cal. Ins. Code § 1031.⁸

On August 2, 1990, Allstate timely removed the Liquidator's breach of contract suit to the United States District Court for the Central District of California based on diversity of citizenship.⁹ Allstate then moved under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, to compel arbitration under the reinsurance agreements and to stay the litigation pending arbitration. J.A. 77. The Liquidator moved to remand the case to state court based on abstention and lack of jurisdiction.

⁸ Some of the contracts name Northbrook Insurance Company, which later changed its name to Northbrook Excess and Surplus Insurance Company ("NESCO"), as the ceding insurer. NESCO, a former subsidiary of Allstate, was merged into Allstate in January 1985, and Allstate assumed all of NESCO's assets and liabilities. J.A. 96-97.

⁹ Allstate's co-defendant Insurance Company of North America ("INA") also joined in the motion. Allstate and INA, which were the only two defendants served with process, Pet. App. 15a, removed the action to federal court on the ground that there was diversity of citizenship between themselves and the Liquidator, 28 U.S.C. § 1332(a), and that the claims asserted against Allstate and INA were separate and independent of the claims against nondiverse defendants, permitting removal under 28 U.S.C. § 1441(c) (1988 ed.), which had not yet been amended to limit such removals to claims giving rise to federal-question jurisdiction under 28 U.S.C. § 1331. J.A. 73, 76. The Liquidator subsequently filed a notice of dismissal of all defendants except Allstate and INA, and Allstate and INA then filed a supplemental notice of removal based on complete diversity between the Liquidator and themselves as the only remaining defendants. J.A. 111-115. INA later settled and was dismissed from the case.

Without deciding Allstate's arbitration motion, the District Court entered an order remanding the case to the state court. Pet. App. 13a-34a. The District Court concluded that it had jurisdiction but should abstain from exercising that jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Although Allstate had not filed an answer to the complaint, the District Court relied heavily on its expectation that the central issue in the case would be Allstate's anticipated defense of setoff and its understanding that the state-court judge had previously dealt with setoff issues in connection with the Mission insolvency. Pet. App. 14a-15a, 25a-26a, 31a, 33a, 34a. It ignored Allstate's argument, among others, that abstention was inappropriate in the face of a motion under the Federal Arbitration Act.¹⁰

Allstate filed a timely appeal from the remand order to the United States Court of Appeals for the Ninth Circuit.¹¹ The Liquidator filed a motion to dismiss the appeal, which was denied. Br. Opp. Pet., App. 1a-2a. On February 2, 1995, a unanimous panel of the Court of Appeals reversed the District Court's order of remand. *Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, Pet. App. 1a-12a.

After holding "that a remand order based on abstention" is "a final collateral order that is reviewable on appeal," 47 F.3d at 353, Pet. App. 5a-6a, citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 11-13 (1983), the Court of Appeals then concluded that abstention was not appropriate in this case. The court reasoned that the *Burford* doctrine, which finds its justification in the discretionary powers of a federal court sitting in equity, should not

¹⁰ Def. Mem. of Law in Opp. to Motion to Remand, 22, 23; Def. Supp. Mem. of Law Respecting Motion to Remand, 7.

¹¹ Allstate requested, in the alternative, that its appeal be treated as a petition for writ of mandamus if that Court found that it lacked appellate jurisdiction. App't Opening Br. 2, n. 1; App't Br. Opp. Motion to Dismiss Appeal 11-12 & n.6.

be extended to actions at law for the recovery of contract damages. 47 F.3d at 354-56, Pet. App. 8a-12a.

On February 16, 1995, the Liquidator filed a petition for rehearing and suggestion for rehearing *en banc*, which the Court of Appeals denied on May 19, 1995. Pet. App. 35a-36a. On August 11, 1995, the Liquidator petitioned this Court for a writ of certiorari, which the Court granted on October 16, 1995. 116 S. Ct. 334.

SUMMARY OF ARGUMENT

This case is about the duty of the federal courts to exercise the jurisdiction conferred on them by Congress. The Courts of Appeals have appellate jurisdiction over appeals from all "final decisions" of the District Courts. 28 U.S.C. § 1291. The District Courts have original jurisdiction over cases between parties of diverse citizenship. 28 U.S.C. § 1332. In both instances, the federal courts lack the authority to refuse to exercise the jurisdiction that Congress has conferred. *E.g.*, *New Orleans Public Service Inc. v. Council of City of New Orleans* ("NOPSI"), 491 U.S. 350, 359 (1989).

I. Because the District Court remanded the case to state court based on the nonstatutory ground of abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), it is uncontested that the bar to appellate review of statutory remand orders, 28 U.S.C. § 1447(d), does not apply. *Things Remembered, Inc. v. Petrarca*, 64 U.S.L.W. 4035 (U.S. 1995); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Appellate jurisdiction is therefore governed solely by the principles of finality embodied in 28 U.S.C. § 1291.

A remand based on the *Burford* doctrine satisfies the most basic principles of finality because it ends the litigation in the District Court and leaves that court with nothing further to do. Because the remand order here put Allstate "effectively out of federal court"—indeed, put Allstate expressly and literally

out of federal court—it was final and appealable under § 1291. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9 (1983).

The suggestion in *Thermtron* that a remand order is not final, which was made without the benefit of briefing and argument by the parties on the issue, relies on a 19th-century case applying an understanding of finality that is flatly inconsistent with this Court's modern cases. The finality of an abstention-based remand is no different from that of an abstention-based dismissal because both have the same effect: the surrender of jurisdiction to a state court. Congress has created no exception to § 1291 beyond the review bar of § 1447(d), and this Court should not do so.

Even if the remand order were not final in the usual sense, it would be final and appealable under the collateral-order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Because the issue of *Burford* abstention is an important question completely separate from the merits of arbitrability and the underlying contract claims, and because the District Court conclusively determined the abstention question in a way that is effectively—indeed, completely—unreviewable on appeal from the final judgment, the remand order is appealable as a final collateral order. *E.g.*, *Moses H. Cone*, 460 U.S. at 11-13.

II. The Court of Appeals correctly reversed the District Court's abstention order. As this Court made clear in *NOPSI*, "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred," 491 U.S. at 358, and may exercise their discretion to deny "certain types of relief" only in narrow and "carefully defined" areas, *id.* at 359. The *Burford* doctrine permits a federal court to refuse equitable relief that would restrain or interfere with a state administrative proceeding or decision only where granting relief would disrupt state policymaking processes by displacing specialized state-court review on matters of peculiarly local concern. *E.g.*, *id.* at 361-362.

Here, however, Allstate is not seeking to restrain or interfere with the Liquidator's performance of his duties; the Liquidator is suing to collect money from Allstate. In addition, the Liquidator's role in this suit is not that of an impartial state regulator pursuing administrative policymaking, but a trustee for the private interests of the Mission companies pursuing contract claims on their behalf. The issues involved, moreover, are not "distinctively local." There is therefore no basis to apply the *Burford* doctrine.

Even setting aside the carefully defined criteria of *Burford*, Allstate's defense of this action in federal court in no way compromises any state interests. First, removal of the Liquidator's suit to federal court does not interfere with any state statutory scheme. California law does not purport to concentrate all litigation involving an insolvent insurer in a single forum. Even if California had sought to do so, this Court has repeatedly held that subjecting a receiver to *in personam* claims outside the receivership court does not interfere with the receiver's functions or the receivership court's administration of the insolvent's estate. *E.g.*, *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989); *Morris v. Jones*, 329 U.S. 545 (1947). The interest of convenience, which any litigant could assert, cannot overcome the statutory right to federal jurisdiction.

Second, the presence of state law issues, whether settled or otherwise, is also no reason to abstain from hearing a case within the court's diversity jurisdiction, which obviously contemplates that a federal court will decide state-law issues. *E.g.*, *Meredith v. City of Winter Haven*, 320 U.S. 228, 236 (1943). If the District Court reaches the state-law issues here, it will only have to decide ordinary issues of contractual interpretation, contractual and common-law defenses, the statutory right of setoff, and whatever other issues the parties may raise. The possibility of inconsistent adjudications in different cases raising similar issues, which is inherent in any multicourt system, provides no reason to abstain.

At a minimum, the District Court had no discretion to abstain in the face of Allstate's motion to compel arbitration under the Federal Arbitration Act. The enforceability of arbitration agreements is a matter of *federal* law, *e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995), and a decision on an arbitration motion therefore cannot conceivably disrupt the development of coherent *state* policy. Allowing a party to delay the resolution of an arbitration motion with "prearbitration litigation" about abstention, *id.* at 843 (O'Connor, J., concurring), would frustrate "Congress' clear intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22.

ARGUMENT

I.

THE DISTRICT COURT'S ORDER REMANDING THE CASE TO STATE COURT WAS REVIEWABLE ON APPEAL

The jurisdiction of the federal courts is defined by Congress, and the judiciary has no authority to expand or contract that jurisdiction. *New Orleans Public Service, Inc. v. Council of the City of New Orleans* ("*NOPSI*"), 491 U.S. 350, 359 (1989); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922). Section 1291 of the Judicial Code provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Thus, the reviewability by appeal of the District Court's order remanding this case to state court is governed solely by the principles of finality embodied in 28 U.S.C. § 1291.¹²

¹² As the Liquidator concedes, Pet'r Br. 18, 21-22, 29-30, the review bar of 28 U.S.C. § 1447(d) does not apply here. This Court held in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-346

Because the District Court's order effectively put Allstate out of federal court, the Court of Appeals correctly held that the order was final and appealable under § 1291 as construed in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). See Pet. App. 4a-8a. As *Moses H. Cone* makes clear, the District Court's order is final for purposes of § 1291 whether the order is treated as a final judgment in the usual sense or as a final collateral order under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).¹³

A. The District Court's Remand Order Was Appealable As a Final Decision Under 28 U.S.C. § 1291.

There can be no question that a District Court's decision to dismiss a case on abstention grounds is final and appealable. See, e.g., *NOPSI*, 491 U.S. at 358; see also *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923) (order quashing service of process for lack of personal jurisdiction). The prospect of subsequent litigation in state court, which an abstention-based dismissal is designed to make possible, does not deprive the dismissal of finality. Section 1291, after all, provides an appeal from the United States District Court to the United States Court of Appeals.

(1976), and recently reaffirmed in *Things Remembered, Inc. v. Petrarca*, 64 U.S.L.W. 4035 (1995), that "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." 64 U.S.L.W. at 4036, citing 423 U.S. at 345-346. *Burford* abstention is an extrastatutory ground for removal; it does not appear in 28 U.S.C. § 1447(c). The only grounds for remand specified in that provision are a "defect in removal procedure" or "lack[] [of] subject matter jurisdiction." 28 U.S.C. § 1447(c); see *Things Remembered*, 64 U.S.L.W. at 4036.

¹³ Allstate asked the Court of Appeals to issue a writ of mandamus in the event an appeal did not lie. See note 11, above. If this Court concludes that review by appeal was unavailable, it should either affirm the judgment below on the alternative ground that the District Court's decision warranted issuance of the writ, see note 21, below, or remand the case to the Court of Appeals with directions to address the petition for mandamus.

In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 351-57 (1988), this Court held that, notwithstanding the absence of express statutory authorization, the district courts have authority to remand a removed case to state court on grounds that would otherwise permit the court to dismiss the case. 484 U.S. at 357. The District Court exercised that authority here. If a district court has authority to remand instead of dismissing upon holding that it should abstain under the *Burford* doctrine, its decision exercising that authority must be subject to appeal pursuant to § 1291 if it is a "final decision" within the meaning of that section.

There can be no question that it is. The District Court's order of remand here had precisely the same effect as a dismissal: it definitively and finally put an end to proceedings in the District Court. Just as with a dismissal, the remand order here was literally the "final"—that is, the last—decision the District Court can or will make absent appellate reversal. Because the order "ends the litigation on the merits and leaves nothing for the court to do," it is final and appealable under 28 U.S.C. § 1291. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995 (1994), quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945). In other words, Allstate must be permitted an appeal now because if it is not, it will be wholly deprived of its right to appeal the District Court's *Burford* ruling. See *Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140 (1935) (federal court's order dismissing defendant's third-party complaint final and immediately appealable because remand of case to state court rendered it otherwise unreviewable). Surely a remanded party's right to an appeal should not turn on the District Court's decision to remand rather than dismiss, when the effect in either case is to surrender jurisdiction to the state court.

This Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), reinforces that conclusion. In *Moses H. Cone*, one of the parties

had brought suit in federal court to compel arbitration pursuant to § 4 of the Federal Arbitration Act, 9 U.S.C. § 4. The District Court, invoking the doctrine of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), stayed the suit on the ground that a pending state-court suit also raised the issue of the arbitrability of the dispute between the parties. This Court held that the stay order was an appealable "final decision" because it put the defendant "effectively out of court" and was therefore tantamount to dismissal. *Moses H. Cone*, 460 U.S. at 10, quoting *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962). The availability of the state court to adjudicate the arbitrability issue did not impair the finality of the stay order. As the Court explained, "a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata." *Id.* at 10. In other words, "effectively out of court" means effectively out of federal court—in keeping with the fact that the decision under appeal is the refusal to exercise federal jurisdiction." *Id.* at 9 n.8 (emphasis in original).¹⁴

The Court observed in *Moses H. Cone* that the finality of the stay order there was "even clearer" than that of the *Pullman* stay order found to be final in *Idlewild* given the prospect that a *Pullman* stay might be lifted should the plaintiff not obtain state-law relief in state court. 460 U.S. at 10. The finality of the District Court's remand here is clearer still. This case, unlike *Moses H. Cone*, does not require the Court to assess the practical effect of the District Court's order; by definition, the function of a remand is "precisely to surrender jurisdiction of a federal suit to a state court." *Id.* at 10-11 n.11. Allstate is not just "effectively" out of federal court; it is expressly and literally so.

¹⁴ The Liquidator repeatedly, albeit cryptically, suggests that Allstate may be able to resort to federal court at some time in the future. Pet'r Br. 18, 25, 26. He does not trouble, however, to identify the route back to federal court he has in mind.

To avoid the holding of *Moses H. Cone*, the Liquidator points to the earlier statement in *Thermtron* that

this Court has declared that because an order remanding a removed action does not represent a final judgment reviewable by appeal, "[t]he remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

Thermtron, 423 U.S. at 353, quoting *Railroad Co. v. Wiswall*, 23 Wall. (90 U.S.) 507, 508 (1875). In effect, the Liquidator argues that by a single sentence in *Thermtron*, this Court intended to carve out an exception from the most basic principles of § 1291 finality for remand orders not subject to the bar of § 1447(d).

The *Thermtron* sentence cannot bear that weight. To be sure, *Thermtron*'s assumption that the remand order there was not final, and hence not appealable, was necessary to the Court's conclusion that mandamus was the proper remedy in that case. But whether the District Court's order in *Thermtron* was reviewed by mandamus or appeal, the ultimate result would have been the same: the remand order would have been set aside and the District Court would have been directed to proceed with the case. Thus, the statement is effectively dictum in the sense that it did not affect the substantive outcome of the case. The statement is not supported by any articulated reasons and was made without the benefit of briefing or argument by the parties.¹⁵

¹⁵ Apart from the one sentence quoting *Wiswall*, the entire discussion of remedy in *Thermtron* concerns the undoubted availability of mandamus in the circumstances of the case. 423 U.S. at 352-53. Neither party in *Thermtron* suggested that the District Court's remand order might be a final order reviewable by appeal under 28 U.S.C. § 1291: the petitioners argued only that mandamus was an appropriate remedy for the refusal of the District Court to proceed, see *Thermtron* Pet'r Br. (No. 74-206) 17-18, while the respondent argued that § 1447(d) barred all forms of review, see *Thermtron* Resp. Br. 4. See also Tr. *Thermtron* Oral Arg. Nor was the issue considered in *Cohill*. See 484 U.S. at 347-48 & n.4; *Cohill* Pet'r Brief (No. 86-1021); *Cohill* Resp. Br.; Tr. *Cohill* Oral Arg.

Rather, the *Thermtron* statement rests entirely on the *Wiswall* case, a three-sentence opinion from 1875 that is wholly inconsistent with modern notions of finality. *Wiswall* dismissed, "upon the authority of *Insurance Company v. Comstock*," a writ of error to review a remand order on the grounds that the order was "not a 'final judgment' in the action but a refusal to hear and decide." *Wiswall*, 23 Wall. at 508, citing *Insurance Co. v. Comstock*, 16 Wall. (83 U.S.) 258 (1872). In *Comstock*, this Court held that the Circuit Court's dismissal of a case (itself a writ of error to the District Court) for lack of jurisdiction was a refusal to proceed and therefore reviewable by mandamus, not writ of error. *Id.* at 270-271.

As *Comstock* and the other cases cited in *Wiswall* make clear,¹⁶ that case does not reflect a distinction between remands, on the one hand, and dismissals or other orders, on the other, but a broader rule about the respective functions of mandamus and error or appeal. These cases form part of a long line of 19th-century precedents in which mandamus was held the appropriate remedy where a lower court had dismissed a case at the outset of proceedings for lack of jurisdiction or had otherwise refused to proceed. See *In re Pennsylvania Co.*, 137 U.S. 451, 452-453 (1890) (collecting and explaining cases); *Ex parte Russell*, 13 Wall. (80 U.S.) 664, 670 (1871); P. Phillips, *The Statutory Jurisdiction and Practice of the Supreme Court of the United States* 276 (2d ed. 1872).¹⁷ These decisions did not make review of this cat-

¹⁶ Each of the cases cited in the margin to *Wiswall*, 23 Wall. at 508 n.†, also supports the notion that mandamus was the proper remedy to correct an erroneous dismissal. *Ex parte Bradstreet*, 7 Pet. (32 U.S.) 634, 647-650 (1833) (granting mandamus to correct District Court's erroneous dismissal of action for lack of subject-matter jurisdiction); *Ex parte Newman*, 14 Wall. (81 U.S.) 152, 165 (1872) (stating in dictum that mandamus lies where lower court "refuses to hear and decide the controversy"); *The King v. Justices of Gloucestershire*, 1 B. & A. 1, 109 Eng. Rep. 688 (K.B. 1830) (issuing mandamus to correct erroneous dismissal of appeal).

¹⁷ See, e.g., *Parker, petitioner*, 131 U.S. 221 (1889) (mandamus reversing dismissal of appeal for lack of jurisdiction); *Ex parte Parker*,

egory of decisions less accessible, but simply required use of the correct writ: mandamus for a "refusal to hear and decide," error or appeal for a "final judgment."¹⁸ If the lower court had jurisdiction but decided not to proceed, mandamus issued as a matter of course.¹⁹

"It should be apparent that th[ese] antique decision[s] provide[] little basis for determining what finality rules should

120 U.S. 737 (1887) (same); *Harrington v. Haller*, 111 U.S. 796 (1884) (similar to *Comstock*, relying on *Wiswall* and *Comstock*); *Ex parte Schollenberger*, 96 U.S. 369 (1878) (mandamus reversing order quashing service for lack of personal jurisdiction); *Ex parte Russell*, 13 Wall. at 669-670 (mandamus reversing dismissal, for lack of subject-matter jurisdiction, of motion for new trial); *Ex parte Bradstreet*, 7 Pet. at 647-650.

¹⁸ See *Wiswall*, 23 Wall. at 508 (because remand order was "refusal to hear and decide" rather than "final judgment," remedy was "by mandamus to compel action, and not by writ of error to review what has been done"); *Ex parte Russell*, 13 Wall. at 670 ("Where a court declines to hear a case or motion, alleging its own incompetency to do so, or that of the party to be heard, mandamus is the proper remedy. A writ of error or appeal does not lie; for what has the appellate court to review where the inferior court has not decided the case, but has refused to hear it?"); *Comstock*, 16 Wall. at 270 (mandamus, not error, was correct remedy because Circuit Court never "passed upon the questions as to the correctness or incorrectness of the rulings of the District Court"); *id.* at 271 ("Mandamus being the proper remedy, error will not lie"); Phillips, above, at 276 (quoting *Ex parte Russell*); see also Edson R. Sunderland, *The Problem of Appellate Review*, 5 Tex. L. Rev. 126, 129-130 (1927) (likening error, certiorari, mandamus, prohibition and appeal to common-law forms of action).

¹⁹ See cases cited in note 17, above. In *Comstock*, the Court had held that "every party" has a "right" to the judgment of the lower court, that this Court "in such case will issue" mandamus "in a case where the subordinate court had improperly dismissed the case," and that the party there "would be entitled" to a remedy if it had asked for the proper writ. 16 Wall. at 270 (emphasis added); see also Phillips, above, at 270 ("well settled" that mandamus "is nothing more than the ordinary process of a court of justice, to which every one is entitled, where it is the appropriate process for asserting the right he claims," quoting *Kentucky v. Dennison*, 24 How. (65 U.S.) 66, 97 (1860)).

be developed today." 15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.11 at 701 n.13 (2d ed. 1992) (referring to *Comstock* as foundation for *Wiswall*). Under modern practice, a dismissal of a case at the pleading stage, even if it "amounts to a refusal to adjudicate the merits," is final and appealable. *Moses H. Cone*, 460 U.S. at 12; see also, e.g., *NOPSI*, 491 U.S. at 358; *Rosenberg Bros.*, 260 U.S. at 517. The District Court's "refusal to hear and decide" this case, *Wiswall*, 23 Wall. at 508, should be no less appealable simply because the Court chose to effect it by way of remand rather than dismissal.²⁰ *Wiswall* cannot survive *Moses H. Cone* and the modern principles of finality it represents.²¹

In short, there is no reason for this Court to follow superseded precedent based on "historical distinctions" that "produce[] arbitrary and anomalous results." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 285 (1988); see *id.* at 279-88 (repudiating *Enelow-Ettelson* interpretation of 28 U.S.C. § 1292(a)(1)). Congress has created no exception to § 1291 for reviewable remand orders, and this Court should not do so.

²⁰ See *Corcoran v. Ardra Insurance Co.*, 842 F.2d 31, 34-35 (2d Cir. 1988) ("Under the surrender-of-federal-jurisdiction test used in *Moses Cone*, we wonder whether it can logically or prudently remain the rule that a reviewable remand order . . . is not reviewable by direct appeal").

²¹ Given the *Comstock/Wiswall* function of mandamus, the application of *Wiswall* to reviewable remand orders today would require the Court to make clear that the writ readily issues whenever a district court improperly abstains. See *Thermtron*, 423 U.S. at 353 ("There is nothing in our later cases dealing with the extraordinary writs that leads us to question the availability of mandamus in circumstances where the district court has refused to adjudicate a case, and has remanded it on grounds not authorized by the removal statutes."). There is simply no reason, however, to permit 19th-century writ practice to interfere in that fashion with the normal application of § 1291.

B. Even If the District Court's Remand Order Were Not Final in the Usual Sense, It Would Be Appealable as a Final Collateral Order.

Even were *Thermtron* read to preclude treating the District Court's remand order as a "final judgment," 423 U.S. at 352-53, the collateral-order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), would provide a separate and independent basis for treating the District Court's remand order as final under § 1291. In *Cohen*, this Court "carved out a narrow exception to the normal application of the final judgment rule, which . . . considers as 'final judgments,'" certain decisions "even though they do not 'end the litigation on the merits,'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798-99 (1989), quoting *Cohen*, 337 U.S. at 546. To qualify as a "final collateral order," an order must

- (1) "conclusively determine the disputed question,"
- (2) "resolve an important issue completely separate from the merits of the action," and
- (3) "be effectively unreviewable on appeal from a final judgment."

Id. at 799, quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The collateral order doctrine counsels the Courts of Appeals to give § 1291 a "'practical construction.'" *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995 (1994), quoting *Cohen*, 337 U.S. at 546.

In *Moses H. Cone*, this Court held alternatively that the abstention-based stay order there was also final under the *Cohen* doctrine. 460 U.S. at 11-13. As the Court of Appeals held here, the District Court's order applying the *Burford* doctrine to remand this case to state court easily meets the *Cohen* three-part test. 47 F.3d at 353-54, Pet. App. 4a-8a.²²

²² See also *Karl Koch Erecting Co. v. N.Y. Convention Ctr. Development Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988) (remand on forum-selection clause grounds appealable); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3rd Cir. 1993) (same); *McDermott Int'l, Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199, 1201-04 (5th Cir. 1991) (same);

The *Moses H. Cone* decision demonstrates why. *First*, in concluding there that the stay order conclusively determined the disputed question of *Colorado River* abstention, this Court held that the technical possibility that "every order short of a final decree is subject to reopening at the discretion of the district judge" did not deprive the stay order of finality. 460 U.S. at 12. Here, even that technical possibility is absent, because the District Court has completely removed the case from its control by remanding it to the state court. *See* 47 F.3d at 353, Pet. App. 6a.

Second, as the Court held in *Moses H. Cone*, "[a]n order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits." 460 U.S. at 12. The remand order here, even more than the stay order in *Moses H. Cone*, is not a "step toward final judgment," but a refusal of the federal court to proceed at all. *Id.* at 12 n.13; *see* 47 F.3d at 353, Pet. App. 6a-7a.

Finally, there can also be no dispute that the District Court's remand order would be effectively unreviewable on appeal from a final judgment. *Moses H. Cone*, 460 U.S. at 12; Pet. App. 7a. Section 1291 concerns itself, of course, with appeals to the federal Courts of Appeal. The Court of Appeals here would have been powerless to review the remand order as part of a final judgment, for the simple reason that any final judgment would be rendered by a California state court. For that reason, the case does not raise any concern "that appellate review *now*" might "force the appellate court to consider approximately the same . . . matter more than once," *Johnson v. Jones*, 115 S. Ct. 2151, 2155 (1995) (emphasis in original). Appellate review of the abstention decision must occur now or not at all.

Regis Associates v. Rank Hotels (Management) Ltd., 894 F.2d 193, 194-95 (6th Cir. 1990) (same); *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 277-78 (9th Cir. 1984) (same); *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1344-45 (10th Cir. 1992) (same).

To avoid the application of the collateral order doctrine, the Liquidator makes three arguments. *First*, the Liquidator argues that the District Court's remand order was not sufficiently conclusive because it did not resolve the issues of arbitrability and setoff. Pet'r Br. 17, 23, 24-25. For purposes of the *Cohen* doctrine, however, it matters not that the District Court did not resolve other issues, such as arbitrability and setoff, so long as the order sought to be appealed reflects a "conclusive determination" on the matter it *did* decide—that is, *Burford* abstention.²³

Second, the Liquidator suggests that Allstate's right to a federal forum to hear this case is not sufficiently "important" to qualify as a final collateral order. Pet'r Br. 29. But even assuming that "importance" states an independent requirement of the *Cohen* doctrine, *but see Digital Equipment*, 114 S.

²³ To support his argument that the remand order did not conclusively resolve the relevant questions, the Liquidator relies on the Second Circuit decision in *Corcoran v. Ardra Ins. Co.* 842 F.2d 31, 35 (2d Cir. 1988), which held that a remand order based on *Burford* abstention was not conclusive where the District Court had left unresolved the appellant's motion to compel arbitration, and the First Circuit decision in *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856, 862-64 (1st Cir. 1993), which followed *Corcoran*. But the reasoning of those two cases is flatly inconsistent with the holding of *Moses H. Cone*. There, the very proceeding in which the District Court had abstained was a petition to compel arbitration pursuant to § 4 of the Federal Arbitration Act. This Court expressly held that the stay order "conclusively determined" the issue sought to be appealed, which was not whether a court or an arbitrator would decide the contract dispute, but whether the state or the federal court would decide the arbitrability dispute. 460 U.S. at 12-13. Here too, the issue on which Allstate sought appeal below was whether the state or federal court would decide Allstate's motion to compel arbitration and, if necessary, the underlying liability issues. *See McDermott*, 944 F.2d at 1203 n.5 ("*Corcoran* is wrongly decided"); *Travelers Ins. Co. v. Keeling*, 996 F.2d 1485, 1489 (2d Cir. 1993) ("Perhaps it would have been possible in *Corcoran* to bring the remand ruling within the *Cohen* doctrine by considering the district court to have conclusively determined the threshold issue of which court (state or federal) would decide arbitrability").

Ct. at 2001, a decision by a District Court to depart from its "virtually unflagging" obligation to exercise its jurisdiction implicates sufficiently important federal rights to satisfy any such requirement, *see id.* at 2001-2003. Because the right Allstate asserts was conferred by Congress, *see* 28 U.S.C. §§ 1332, 1441, there is "little room for the judiciary to gainsay its 'importance.'" *Id.* at 2001.

Third, the Liquidator argues that the rule mandated by *Moses H. Cone* permits the "'narrow exception'" of *Cohen* to "'swallow the general rule'" because "remands . . . routinely occur." Pet'r Br. 24. The Liquidator misses the point. Limiting the types of orders that qualify as final collateral orders cannot be a goal in itself; the *Cohen* criteria themselves are designed to serve that function. Regardless of the frequency with which abstention-based remands occur, *Moses H. Cone* makes clear that a District Court's refusal on abstention grounds to adjudicate a matter within its jurisdiction finally determines an important federal right so as to qualify for appeal as a final collateral order.

II.

THE EXTRAORDINARY CIRCUMSTANCES JUSTIFYING *BURFORD* ABSTENTION CANNOT ARISE IN AN ACTION AT LAW ON A CONTRACT.

Within constitutional bounds, Congress has sole authority to define the jurisdiction of the federal courts. *New Orleans Public Service Inc. v. Council of the City of New Orleans* ("*NOPSI*"), 491 U.S. 350, 359 (1989); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922). Congress has given defendants in Allstate's position a statutory right to remove a case to United States District Court. 28 U.S.C. §§ 1332, 1441. From earliest days, this Court has emphatically stated that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *NOPSI*, 491

U.S. at 358; *see, e.g., Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 404 (1821) (Marshall, C.J.) ("to decline the exercise of jurisdiction [or] usurp that which is not given . . . would be treason to the constitution").

While the Court has recognized that the federal courts' obligation to exercise their jurisdiction does not "eliminate [their] discretion in determining whether to grant certain types of relief" insofar as such discretion "was part of the common-law background against which the statutes conferring jurisdiction were enacted," *NOPSI*, 491 U.S. at 359, citing David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 570-77 (1985), it has simultaneously cautioned that that discretion is an "'extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976), quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959). Accordingly, the Court "ha[s] carefully defined . . . the areas in which such 'abstention' is permissible, and it remains 'the exception, not the rule.'" *NOPSI*, 491 U.S. at 359, quoting *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984), quoting *Colorado River*, 424 U.S. at 813. In the absence of the "carefully defined" circumstances that might justify the exercise of discretion not to decide a given controversy, federal courts must remain faithful to their "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817.

The Liquidator's action for money damages on a series of contracts between Allstate and Mission presents no circumstance that might have justified the District Court's decision not to decide Allstate's motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 3-4, or, were that motion denied, the underlying liability disputes. The Court of Appeals correctly held that the District Court had no discretion to abstain under the principles of *Burford v. Sun Oil Co.*,

319 U.S. 315 (1943), and therefore properly reversed the District Court's order of remand.

A. The *Burford* Doctrine Applies Only to Actions Seeking to Review State Administrative Proceedings Where Such Review Would Interfere with State Policymaking Processes On Matters of Distinctively Local Concern.

The Court of Appeals' holding that the District Court had no discretion to decline to go forward with the action rests on a limitation that inheres in the very purpose and justification of the *Burford* doctrine. 47 F.3d at 354-56, Pet. App. 8a-12a.

In *Burford*, an oil company sued in United States District Court to enjoin enforcement of an order of the Texas Railroad Commission granting an oil-drilling permit to one of the company's competitors. 319 U.S. at 317 & n. 1. This Court held that "as a matter of sound equitable discretion," the District Court should "stay its hand." *Id.* at 318, 334.

The Court relied on two features of the Texas regulatory scheme at issue. First, given the local geological realities, the grant of any one permit directly affected every other present or prospective permitholder, so that each case had to be treated "as 'one more item in a continuous series of adjustments,'" *id.* at 332; *see id.* at 318-25 & nn.15-18. Second, Texas had entrusted the Commission with "broad discretion" in fulfilling its mandate to prevent waste in the Texas oil fields, and had concentrated direct review of the Commission's orders in a single county so that the state courts there exercised "judicial supervision of Railroad Commission orders," acquired "specialized knowledge," and became "working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry." *Id.* at 326-27. The Court rested its decision squarely on the discretion of a "federal equity court" to "decline to exercise its jurisdiction" when judicial restraint was "required by con-

siderations of general welfare." *Id.* at 334, 333 n.29; *see NOPSI*, 491 U.S. at 360.

The Court came to the same result for the same reason in *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), the only other case in which this Court has authorized a federal court to abstain in reliance on the *Burford* doctrine. In *Southern Railway*, this Court held that, "as a matter of sound equitable discretion," the federal court should decline to review an Alabama Public Service Commission order refusing a railroad company permission to discontinue certain passenger service within the state. *Id.* at 345, quoting *Burford*, 319 U.S. at 318.

The Court stressed the same facts as in *Burford*. First, the Commission's order had required a balancing between the costs to the railroad company and the need for the local service. *Southern Railway*, 341 U.S. at 345-48. Second, the Alabama scheme concentrated review of the Commission's orders in a single county; appeals to the state court were "supervisory in character," *id.* at 348 (citation omitted); and the court's review of the "administrative order [was] based upon predominantly local factors." *Id.* at 349. As in *Burford*, the Court stressed that, in declining to grant the injunction, the federal court would not be abdicating its responsibility to exercise its jurisdiction, but instead exercising the discretion of "a federal court of equity" to "stay its hand in the public interest when . . . private interests will not suffer . . ." *Id.* at 350-51; *see NOPSI*, 491 U.S. at 360-61.

In *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), this Court confirmed the foundation of the *Burford* doctrine in the exercise of equitable discretion to avoid interference with state policymaking processes. There, a plaintiff in a tort action brought an action for money damages against the alleged tortfeasor's insurer under Louisiana's direct action statute. The Court easily rejected an argument based on the *Burford* doctrine that the case presented grounds for a "dis-

cretionary refusal to exercise jurisdiction" because of differing standards of review of jury verdicts in state and federal courts, pointing out that

in *Burford*, jurisdiction was declined to avoid a potential for conflict with a state's policy-making process, a consideration not present here. Moreover, traditional equitable authority, not available here, was relied upon to justify the holding.

348 U.S. at 53.

Most recently, in *NOPSI*, the Court held that the *Burford* doctrine did not bar a suit in which a public utility sought to enjoin on federal preemption grounds the enforcement of the utility rate order of a local regulatory body. The Court first summarized the *Burford* doctrine:

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

491 U.S. at 361, quoting *Colorado River*, 424 U.S. at 814.

Applying the doctrine, the Court held that, notwithstanding the availability of state-court review of the order, the District Court had erred by refusing to hear the utility's claim. The Court explained:

While *Burford* is concerned with protecting complex state administrative processes from federal interference, it does not require abstention whenever there exists such

a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy.

Id. at 362, quoting *Colorado River*, 424 U.S. at 815-816. Where federal adjudication of the claim "would not disrupt the State's attempt to ensure uniformity in the treatment of an 'essentially local problem,' " *id.*, quoting *Alabama Pub. Serv. Comm'n*, 341 U.S. at 347, the resolution of which "demand[s] significant familiarity with . . . distinctively local regulatory facts or policies," *id.* at 364, there could be no basis for *Burford* abstention.

These cases establish at least two essential predicates to *Burford* abstention. *First*, the doctrine does not establish a general discretion in a federal court to depart from its obligation to decide cases whenever the court finds a sufficiently weighty state interest involved. Instead, the court's authority not to go forward is based on, and limited by, its discretion to withhold particular types of relief in particular circumstances, most importantly an equity court's discretion to withhold injunctive relief when the public interest calls for restraint. *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-313 (1982). Absent equitable discretion to withhold such relief, there is no basis to apply the *Burford* doctrine.

Second, the *Burford* doctrine does not confer authority to abstain in every case in which the plaintiff seeks equitable relief from a state administrative order, but only in those rare circumstances in which the request to restrain enforcement of the order would require the federal court to displace the judgment of a state court, equally available to entertain the federal plaintiff's challenge, in an area that demands specialized knowledge of a local problem and coordinated treatment of interconnected cases. Absent a threat that federal injunctive relief would override a state administrative determination on a matter of peculiarly local concern, there is no basis to apply the *Burford* doctrine.

1. The District Court Had No Discretion to Abstain Because Allstate Sought No Injunctive Relief.

Allstate did not bring this lawsuit; the Liquidator did. Allstate simply removed the case to federal court. *See* 28 U.S.C. §§ 1332, 1441. In removing, Allstate did not attempt to restrain or interfere with the Liquidator's performance of his duties in any way, let alone seek review of an order of the Liquidator in any administrative capacity. Nor will Allstate's defense of the action restrain the Liquidator in any way. Allstate intends simply to pursue its motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 2-4, and to pursue such defenses as are just and well-founded. The *only* effect on the Liquidator of Allstate's assertion of its federal right to remove the case is that a federal court, rather than the state court in which the Liquidator originally filed the suit, will adjudicate the motion to compel arbitration and, if necessary, the Liquidator's contract claims.

Thus, as the Court of Appeals held, the relief Allstate seeks in defending the action—either a stay of the litigation so that arbitration might be had or, failing that, setoff or denial of the Liquidator's contract claims on the merits—is alone dispositive of the District Court's discretion to abstain on *Burford* grounds. Because Allstate, the defendant here, seeks no injunctive or other equitable relief to review or restrain the conduct of an administrative agency on a matter of peculiarly local concern, the District Court had no equitable discretion to exercise in determining whether to go forward. *See NOPSI*, 491 U.S. at 360-62.²⁴ In other words, by definition, a funda-

²⁴ *See also* *Fragoso v. Lopez*, 991 F.2d 878, 882 & n.6 (1st Cir. 1993); *Tribune Co. v. Abiola*, 66 F.3d 12, 15-17 (2d Cir. 1995); *University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265, 271-272 (3d Cir. 1991); *Todd v. DSN Dealer Service Network, Inc.*, 861 F. Supp. 1531, 1541 (D. Kan. 1994); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 270 (D. Vt. 1993); *Duane v. Government Employees Ins. Co.*, 784 F. Supp. 1209, 1223 (D. Md. 1992), *aff'd*, 37 F.3d 1036 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 1251, *cert. dismissed*, 115 S. Ct. 2272 (1995).

mental requirement of the *Burford* doctrine cannot be met in a contract action for money damages brought against a private citizen.²⁵

By making clear that the *Burford* doctrine is available only to federal courts that are "sitting in equity" and therefore must "determin[e] whether to grant certain types of relief," *NOPSI*, 491 U.S. at 359, this Court has not revived some antiquated distinction between legal and equitable forms of pleading. *See* Pet'r Br. 19-21, 31-40. To the contrary, given that "federal courts lack any discretion to abstain from the exercise of jurisdiction that has been conferred," *NOPSI*, 491 U.S. at 358, the Court has simply instructed that a district court must ground any decision not to entertain a claim in an identifiable source of authority to withhold relief.²⁶

²⁵ Nor does the Liquidator's inclusion of a claim for declaratory relief in his complaint confer any discretion on the District Court. Unlike the situation in *Wilton v. Seven Falls Corp.*, 115 S. Ct. 2137 (1995), in which the defendant in a damages action had inverted the normal posture of the parties by filing a separate action seeking a declaration of nonliability, *id.* at 2139, the Liquidator's request for a declaration of liability simply recasts his request for damages in a different form. J.A. 51-53. The discretion that the Declaratory Judgment Act, 28 U.S.C. § 2201, gives a district court to withhold declaratory relief in appropriate circumstances, *see* 115 S. Ct. at 2143, surely does not authorize the court to accede to a declaratory judgment plaintiff's request that the defendant not be permitted to remove the action—including the claims at law for contractual damages—to federal court. *See id.* (request for declaratory judgment as exception to "the normal principle that federal courts should adjudicate claims within their jurisdiction"). The Liquidator's contention that a declaratory judgment action is always considered "equitable" is thus irrelevant; in any event, he has waived the argument, *see* J.A. 171, which is plainly wrong under both federal and California law, *see* J.A. 172-175.

²⁶ The Liquidator's discussion of the formal merger of law and equity in the Federal Rules of Civil Procedure, Pet'r Br. 33-34, is therefore irrelevant. Those Rules are procedural only and have no effect on substantive law. *See* 28 U.S.C. § 2072(b) (federal rules "shall not abridge, enlarge or modify any substantive right"); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n. 26 (1949). For the same reason, the Liquidator misses the point when he argues that a court that abstains should always

For that reason, the Liquidator undertakes a meaningless task when he seeks support in several decisions of this Court in which, he contends, the Court approved "abstention" in actions at law. Pet'r Br. 35-40. None of these decisions provides the Liquidator any support.

The Liquidator first points to three cases applying the *Pullman* doctrine: *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970) (*per curiam*) (approving *Pullman* deferral without discussing nature of action or relief sought); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962) (*per curiam*) (same); and *Clay v. Sun Ins. Office*, 363 U.S. 207 (1960) (suggesting certification of question to state supreme court based on *Pullman*-like reasoning). Under that doctrine, a district court may defer consideration of a federal constitutional challenge to a state statute in order to give the state courts an opportunity to give the statute a saving construction. See *Railroad Comm'n v. Pullman* 312 U.S. 496 (1941); *Grove v. Emison*, 113 S.Ct 1075, 1080 n.1 (1993) (*Pullman* doctrine calls for "deferral," not "abstention"). The accomplishment of that objective, unlike the *Burford* objective of avoiding interference with administrative proceedings, does not depend on the nature of the relief sought in the action in which the constitutional issue arises. The absence of a request for equitable relief is therefore not relevant to the scope of the *Pullman* doctrine.

Similarly, in authorizing *Pullman*-like deferral in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28-31 (1959) (citing *Pullman* but not *Burford*), this Court simply recognized that principles of restraint prevailing in "conventional equity suits" also applied in the context of an eminent domain proceeding where necessary to allow the Louisiana courts to settle the question whether the city that

be regarded as exercising its equitable jurisdiction in doing so. Pet'r Br. 40-42. The authority to abstain turns not on a label arbitrarily placed upon that authority but on the relief in response to which the authority is exercised.

had exercised eminent domain authority actually had such authority under Louisiana law.²⁷ So too, in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 111 (1981), the Court held only that the longstanding principle of comity that had "led federal courts of equity to refuse to enjoin the collection of state taxes" and "require[d] a like restraint in the use of the declaratory judgment procedure" also barred a suit for damages under 42 U.S.C. § 1983 based on a claim that the state's administration of its tax system was unconstitutional. The *McNary* Court's extension of the principle against enjoining state tax collection to a § 1983 damages action was expressly based on its conclusion that in order to award damages, the district court would effectively have to make a "'declaration' " of unconstitutionality that "would halt the administration of the state tax system" and "would be fully as intrusive" as the injunctive or declaratory relief barred under

²⁷ The Court emphasized that an eminent domain proceeding, while technically legal, was both "special and peculiar" and "intimately involved with sovereign prerogative." 360 U.S. at 28. The basis—and limited scope—of *Thibodaux* is made clear by this Court's reversal, on the same day and on virtually identical facts, of an abstention order in a case in which the county's power of eminent domain was clear under state law. See *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-197 (1959).

In dictum in *Ankenbrandt v. Richards*, 504 U.S. 689, 705-706 & n.8 (1992), the Court speculated that it was "not inconceivable" that a federal court might stay a case before it to allow a state court to rule on a question of state law, the "public import" of which "transcend[ed] the case at bar," if the relief sought by the federal plaintiff required the court to rule as if issuing a divorce, alimony, or child custody decree. The *Ankenbrandt* Court's speculation about deferring on an issue relating to the status of a domestic relationship provides no support for the suggestion that *Burford* might apply to this contract action. Pet'r Br. 38-39. The *Ankenbrandt* dictum cautioned only against invading the realm of divorce, alimony, and child custody decrees, each of which involves a court's equitable powers and, as the *Ankenbrandt* Court itself held, falls outside diversity jurisdiction. *Id.* at 693-704. And, of course, *Ankenbrandt* held that *Burford* abstention was inappropriate in the tort action before it.

the principles of comity applicable to constitutional attacks on state tax systems. *Id.* at 115, 113; *see id.* at 107-117.

The Liquidator also cites *Langnes v. Green*, 282 U.S. 531, 541-544 (1931), which was not at law but in admiralty. In ordering the dissolution of an antisuit injunction in order to allow a common-law claim to go forward in state court, the Court expressly rested on the discretionary powers of an admiralty court in a limitation-of-liability proceeding, which is akin to a proceeding in equity to distribute a limited fund. *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* §§ 10-8, 10-17 to 10-19 (2d ed. 1975).

Finally, Congress's decision in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, to allow states to regulate the business of insurance, *see* Pet'r Br. 4, 45-47, provides no grounds to apply *Burford*. As *NOPSI* makes clear, the mere presence of state regulatory interests provides no grounds to abstain. 491 U.S. at 362; *see Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 960 (3d Cir. 1993).²⁸

²⁸ Contrary to the Liquidator's suggestion, Pet'r Br. 47 n.87, the reference to the McCarran Amendment, 43 U.S.C. § 666, in *Colorado River* does not support reliance on the McCarran-Ferguson Act here. The McCarran Amendment, which gave the consent of the United States to be sued in state court where certain water rights were in issue, was designed specifically to promote unified adjudication of water rights. *Colorado River*, 424 U.S. at 819. The McCarran-Ferguson Act, by contrast, has nothing at all to say about state-court jurisdiction, but only insulates certain state regulation of the business of insurance from federal preemption. 15 U.S.C. §§ 1011-1015.

As the District Court concluded, and the Liquidator has not since challenged, a *Colorado River* stay is unavailable here because there is no concurrent litigation. Pet. App. 22a-23a. The Liquidator's claims against Allstate are not pending in the state court, and Allstate's potential defense of setoff under Cal. Ins. Code § 1031 is a statutory right independent of its primary contract claims in the liquidation proceeding.

The Liquidator has not suggested here or in the courts below that the antipreemption provision of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), might apply of its own force to bar Allstate's removal. Nor could he: the California Insurance Code does not purport to bar the litigation of the Liquidator's claims in federal court, *see* Part II.B.1, below;

In short, none of the authorities on which the Liquidator relies to establish that some species of "abstention" might be available in an action at law provides any support for the District Court's decision here that the *Burford* doctrine afforded discretion to refrain from deciding a contract action for money damages that the defendant had properly removed.²⁹

and in any event, § 1012(b) would not protect a law purporting to displace diversity jurisdiction because, among other things, such a law would be "logically and temporally unconnected to the transfer of risk" under an insurance policy and therefore would not regulate the "business of insurance." *United Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 130 (1982); *see also United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2209 (1993). In enacting the McCarran-Ferguson Act to protect state laws regulating insurance from preemption, Congress did not intend to deprive the federal courts of jurisdiction to apply those laws.

²⁹ To the extent that the Liquidator's *amici curiae* The Council of State Governments and others intend to suggest that the District Court should have abstained on the authority of *Thibodaux* or *McNary* (Br. for Amici Council of State Gov'ts *et al.* 10-14), this Court should not entertain the suggestion. The Liquidator did not rely upon the analysis or holding of either case in either the District Court or the Court of Appeals, and he should not be permitted to urge a new ground here. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

In any event, neither *Thibodaux* nor *McNary* would support abstention in the circumstances here. First, there is no state-law issue remotely analogous to that which justified deferral of federal proceedings pending a state-court determination of state law in *Thibodaux*. *See* Part II.B.2, below; *see also* Part II.C, below. Equally, there is no principle of comity applicable to insolvency proceedings remotely analogous to that barring constitutional attacks on the administration of state tax systems found dispositive in *McNary*. *See* Part II.B.1, below. The caution *Thibodaux* and *McNary* reflect about challenges in federal court to core aspects of state sovereignty, such as eminent domain and taxation, has no application here. While the states undoubtedly have an important interest in insurance regulation, the administration of an insolvent's estate, unlike the power to tax or take property, is not central to its sovereign power. This case also differs from *Thibodaux* and *McNary* in that the authority of the Liquidator to act as receiver of Mission, and the validity of the state statutes authorizing him to act in that capacity, are not in question. This Court has warned against "concoct[ing] abstention doctrine[s] out of whole cloth," *Ankenbrandt*, 504 U.S. at 706 n.8, and there is no reason to do so here.

2. The District Court Had No Discretion to Abstain Because Allstate Did Not Seek to Interfere with State Policymaking.

Allstate came to the District Court not to ask that it override an administrative determination made by the Insurance Commissioner in his role as impartial regulator acting in the public interest, but to defend itself against a commercial claim initiated in a state court of general jurisdiction by the Commissioner as Liquidator on behalf of private parties to whom he owes a fiduciary's duty of loyalty. Because the Liquidator was not acting in a regulatory capacity, there could be no prospect that Allstate's defense against the Liquidator's contract claims would interfere with state policymaking.

The character of the Liquidator's activity here—and the absence of circumstances giving rise to *Burford's* concern for protecting certain *administrative* proceedings—is reflected in the nature of this action. To collect monies allegedly owed to an insolvent insurer by a third party, the Liquidator does not conduct an administrative proceeding, but commences an ordinary civil action. *Kinder v. Superior Court (Market Ins. Corp.)*, 78 Cal. App. 3d 574, 579, 144 Cal. Rptr. 291, 295 (1978); *Maloney v. Rhode Island Ins. Co.*, 115 Cal. App. 2d 238, 249, 251 P.2d 1027, 1033-34 (1953); see Cal. Ins. Code § 1037(f).³⁰ In that action, the Liquidator must prove facts and make legal arguments like any other litigant.³¹ And the subject matter of such an action, which by the Liquidator's own

³⁰ The Liquidator brought this suit against Allstate as an independent action, and it bore a Superior Court docket number separate from that of the liquidation proceedings. See J.A. 35 (Complaint). The underlying liquidation proceeding, a "special proceeding," is also judicial, not administrative. Cal. Ins. Code §§ 1011 *et seq.*; see also Cal. Code Civ. Proc. §§ 22-23; Pet'r Br. 4.

³¹ The defendant in an action brought by the Liquidator is entitled to all the protections of a plenary trial under California law, including the right to trial by jury if the action is at law and to findings of fact and conclusions of law if the case is tried to the bench. *Kinder*, 78 Cal. App. 3d at 581, 144 Cal. Rptr. at 296.

account might here have included claims against any one of hundreds of domestic reinsurers, as well as foreign reinsurers from at least 28 countries, Pet'r Br. 9-11 & n.25, 14 & n.33, is certainly not "distinctively local." *NOPSI*, 491 U.S. at 364.

Further, the Liquidator brings the action in pursuit of private pecuniary interests. The California insurance insolvency statute expressly provides that "[i]n all proceedings under this article, the commissioner shall be deemed to be a trustee for the benefit of all creditors and other persons interested in the estate" of the insolvent insurer. Cal. Ins. Code § 1057; see *id.* §§ 1010-1062; *Texas Commerce Bank-El Paso v. Garamendi*, 28 Cal. App. 4th 1234, 1244, 34 Cal. Rptr. 2d 155, 161 (1994); see also Pet'r Br. 3, citing *Anderson v. Great Republic Life Ins. Co.*, 41 Cal. App. 2d 181, 188, 106 P.2d 75, 79 (1940). The caption on the Liquidator's papers confirms that he brings this action "in His Capacity as Liquidator and Trustee" of various trusts established in the stead of the insolvent Mission companies. Pet'r Br. 2 n.2. And the California Court of Appeal has confirmed that "the commissioner is a public official acting on behalf of the state when dealing with insolvent insurers in general, but once appointed conservator of a particular insolvent insurer, the commissioner steps into the shoes of that insurer." *Texas Commerce Bank*, 28 Cal. App. 4th at 1245, 34 Cal. Rptr. 2d at 162.³²

Regardless of the Liquidator's status as fiduciary for private interests, the Liquidator's claim arises from a contract

³² Accord, e.g., *Corcoran v. National Union Fire Insurance Co.*, 143 A.D. 2d 309, 532 N.Y.S.2d 376, 378 (1988) (Superintendent of Insurance acting as liquidator of insolvent insurance company "acts in a separate and distinct capacity from his role as regulator of the insurance industry," conducting insolvent's operations "for the benefit of its creditors and policyholders, as opposed to the benefit of the general public"); *Helvering v. Therrell*, 303 U.S. 218, 225 (1938); *Crawford v. Employers Reins. Co.*, 896 F. Supp. 1101, 1102 (W.D. Okla. 1995); *Eagle Life Ins. Co. v. Hernandez*, 743 S.W.2d 671, 672 (Tex. App. 1987); *Matter of Kinney (Miller)*, 257 A.D. 496, 501, 14 N.Y.S.2d 11, 16, *aff'd*, 281 N.Y. 840, 24 N.E.2d 494 (1939).

right belonging to Mission's estate, *see Prudential Reins. Co. v. Superior Court (Garamendi)*, 3 Cal. 4th 1118, 1136-37, 842 P.2d 48, 59, 14 Cal. Rptr. 2d 749, 760 (1992),³³ and any recovery on the Liquidator's claim against Allstate will accrue to the benefit of the liquidation estate and hence to Mission's creditors.³⁴ The expenses of the liquidation, including the salary of a deputy liquidator who may supervise litigation and the fees of counsel who conduct it, are paid out of the assets of the receivership estate. Cal. Ins. Code §§ 1033, 1035. Because he is pursuing private claims, the Liquidator is treated as a private litigant. *See Texas Commerce Bank*, 28 Cal. App. 4th at 1245-46, 34 Cal. Rptr. 2d at 162.³⁵

³³ The Liquidator's suggestion, without citation to California authority, that Mission's insolvency transformed its contracts into "regulatory agreements" with a state official, Pet'r Br. 49, is both irrelevant and flatly contradicted by California law. *See Prudential Reinsurance*, 3 Cal. 4th at 1136-37, 842 P.2d at 60, 14 Cal. Rptr. 2d at 760 (rejecting argument that insolvency transmuted reinsurance contracts into agreements with regulator so as to defeat setoff rights).

³⁴ All fifty states have established statutory guarantee associations, funded by the insurance industry, to protect policyholders from the effect of insurance company insolvencies. *See* note 3, above. To the extent that policyholder claims are covered by guarantee associations, recovery of a claim by an insolvent insurance company benefits not its individual policyholders but the guarantee associations and the solvent insurance companies that constitute their membership.

³⁵ It is plain that the Insurance Commissioner, as Liquidator and Trustee pursuing the interests of the estate's creditors, could not simultaneously act as neutral regulator pursuing the general welfare of the people of California. *See Texas Commerce Bank*, 28 Cal. App. 4th at 1244, 34 Cal. Rptr. 2d at 161 (liquidator owes estate's creditors "a duty of loyalty, which has been interpreted to mean that the trustee must administer the trust *solely* in the interest of the beneficiary") (emphasis added). For example, a House subcommittee has concluded that the Liquidator here, in effect, turned a blind eye to substantial evidence of fraud by former Mission management so as not to compromise his chances of recovering against Mission's reinsurers. *See Subcomm. on Oversight, supra* note 4, at 62-63, 74. Regardless of whether former Mission management actually committed fraud or what conclusions the Liquidator reached on

The *Burford* doctrine provides a shield to protect state policymaking processes conducted by administrative agencies on matters of local concern, not a sword to defeat diversity jurisdiction in private commercial litigation. Because Allstate's defense of this action poses no risk of "interference with [California's] administrative policy-making process," *Lumbermen's Mutual*, 348 U.S. at 53, the District Court had no discretion to abstain. *See NOPSI*, 491 U.S. at 360-62; *Tribune Co. v. Abiola*, 66 F.3d at 15-17; *Fragoso v. Lopez*, 991 F.2d at 882 & n.6.

B. Neither of the Interests the Liquidator Asserts Here May Defeat Allstate's Right to Invoke the District Court's Diversity Jurisdiction.

At bottom, the Liquidator's position here rests not on the carefully circumscribed *Burford* doctrine, but on an infinitely broader notion that a District Court should be permitted to abstain whenever the controversy before it arises in an area affected by state regulation. Not only would such a notion precipitate enormous amounts of wasteful litigation, as litigants found cause to urge abstention in the faintest whiff of a state interest, but it is flatly inconsistent with Congress's grant of diversity jurisdiction to the federal courts. But even if, as the Liquidator implicitly suggests, the *Burford* doctrine permitted a District Court to replace this Court's precisely delimited criteria with an *ad hoc* balancing of the state and federal interests present in each case, there would be no basis for abstention here.

the matter, the Subcommittee Report highlights the inconsistency between a liquidator's obligation vigorously to defend against such allegations as representative of the insolvent insurer and the duty of an impartial regulator to root out fraud.

1. The Liquidator's Preference for Consolidated Litigation Cannot Defeat Allstate's Right to Invoke Diversity Jurisdiction.

The Liquidator repeatedly argues that requiring him to pursue his suit against Allstate in federal court would "disrupt[]" California's statutory insolvency scheme, because, according to the Liquidator, that scheme "clearly contemplates . . . a single, integrated proceeding to devise and implement rehabilitation plans, to marshal assets, accept and adjudicate claims, and otherwise to protect policyholders." Pet'r Br. 21, 31. California law, however, could not and does not require concentration of all litigation in the liquidation court. And a long line of this Court's cases squarely refutes the notion that a liquidator or receiver has any reason to complain about the adjudication of claims involving the insolvent outside the liquidation or receivership proceeding.

As an initial matter, California does not have the constitutional authority to derogate from jurisdiction granted by Congress by claiming exclusive authority over suits relating to a given subject. *Pennsylvania v. Williams*, 294 U.S. 176, 180-82 (1935); *Penn General Cas. Co. v. Pennsylvania*, 294 U.S. 189, 197 (1935); see also *Harrison v. St. Louis & S.F.R. Co.*, 232 U.S. 318, 328-329 (1914). Equally, a state court does not have the constitutional authority to enjoin a party from pursuing an *in personam* claim in a federal court. *General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977); *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964).³⁶

³⁶ While the Liquidator refers to the liquidation court's injunction, Pet'r Br. 8-9 & n.20, he does not argue that the injunction barred Allstate from removing this action. In any event, the liquidation court's injunction does not, by its own terms, apply to this suit, which was initiated by the Liquidator, see, e.g., J.A. 9, 24, and Allstate could not now be precluded from challenging the injunction if it did, see *Martin v. Wilks*, 490 U.S. 755 (1989); *Underwriters Nat'l Assur. Corp. v. North Carolina Life Ins. Guar. Ass'n*, 455 U.S. 691 (1982).

Unsurprisingly, then, the California statutory scheme does not depend on the consolidation of all estate-related litigation in the liquidation court. The California Insurance Code authorizes the liquidator to "collect all debts due and claims belonging to" the insurer in liquidation, *id.* § 1037(b); authorizes him or her to "prosecute and defend any and all suits and other legal proceedings" involving the insurer, *id.* § 1037(f); and establishes jurisdiction in the liquidation court over any actions brought by or against the insurer, *id.* § 1058. Nothing in the statute, however, purports to require that all actions involving an insolvent insurer be brought in the same court in which the liquidation proceeding was commenced. See *Webster v. Superior Court (Gillespie)*, 46 Cal.3d 338, 343-53, 758 P.2d 596, 598-603, 250 Cal. Rptr. 268, 271-78 (1988) (liquidation court not required to enjoin proceedings against insolvent insurer in other courts); accord *Fabe v. Columbus Ins. Co.*, 68 Ohio App. 3d 226, 233, 587 N.E.2d 966, 970 (1990) (Ohio law). This case began in the same court in which the liquidation proceeding is pending only because the Liquidator, for his own convenience, chose to file it there.

At the Liquidator's own request, the Mission liquidation court has entered a series of orders providing "[t]hat the Liquidator is authorized to initiate such equitable or legal actions or proceedings *in this or other states* as may appear to him necessary to carry out his functions as Liquidator." E.g., J.A. 10 (emphasis added). As conservator or liquidator of other insurers, the Commissioner has frequently availed himself or herself of the right to litigate in federal court and in courts of states outside of California.³⁷ Indeed, allowing liquidators

³⁷ See, e.g., *Gillespie v. Waite-Hill Assur. Ltd.*, No. 87-08504 RMT (Kx) (C.D. Cal. 1987) (Commissioner as liquidator of insolvent insurers sued to collect under reinsurance contract); *Garamendi v. Caldwell*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,861 (C.D. Cal. 1992) (Commissioner as liquidator of insolvent insurer sued for damages for fraud, negligent misrepresentation, and RICO violations); *Oakbrooke Assocs., Ltd. v. Insurance Comm'r of Cal.*, 581 So. 2d 943 (Fla. App.

access to other states' courts is one of the central purposes of the Uniform Insurers Liquidation Act, which California has adopted.³⁸

Thus, the Liquidator's argument boils down to an assertion that in order to avoid interfering with the liquidation of an insolvent insurer, federal courts should cede to the liquidation court jurisdiction over any case involving that insurer. This Court has repeatedly rejected that assertion, holding to the contrary that the adjudication of ordinary contract claims involving a company in receivership does not interfere with the receiver's administration of the company's assets or the payment of its creditors. *See, e.g., Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 575-76 (1989); *Morris v. Jones*, 329 U.S. 545, 548-50 (1947); *United States v. Klein*, 303 U.S. 276, 281-83 (1938); *Riehle v. Margolies*, 279 U.S. 218, 223-25 (1929); *Bank of Bethel v. Pahquioque Bank*, 14 Wall. (81 U.S.) 383, 401-02 (1872).

This Court has carefully delineated both the scope and limits of the principle of reciprocal comity that applies when one court, either federal or state, has taken jurisdiction *in rem* over specific property, as has the liquidation court over Mission's assets. "[T]he settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation," which is "applicable to both federal and state

1991) (Commissioner as liquidator of insolvent insurer sued in Florida state court to enforce assignment of rents and leases); *Nassau Square Assocs. v. Insurance Comm'r of Cal.*, 579 So. 2d 259 (Fla. App. 1991) (similar).

³⁸ See Prefatory Notes ¶2, in 13 U.L.A. 321, 322 (1986 ed.). The Uniform Act also authorizes insurance commissioners in other states to establish ancillary liquidation proceedings in which creditors can prove claims against the insolvent insurer, *see* note 1, above, in order to spare creditors residing in those states "the expense, annoyance and hardship of proceeding in the courts of the domicile of the insurance company." *Id.* ¶4, 13 U.L.A. at 323; *see* Cal. Ins. Code §§ 1064.3(b), 1064.4(b). The disposition of claims in such ancillary proceedings is binding on the California liquidation court. Cal. Ins. Code § 1064.4(b).

courts," is that "the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other." *Penn General Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935).³⁹ But "[w]here the judgment sought is strictly *in personam*, for the recovery of money or for an injunction," another court need not yield. *Penn General*, 294 U.S. at 195; *see Kline*, 260 U.S. at 230-31.

Applying this rule, this Court has held time and again that a federal court may not surrender jurisdiction over an *in personam* claim involving an insolvent estate simply because, as here, a state court has control over the *res*. For example, in *Morris v. Jones*, the Court held that in light of the requirements of full faith and credit, the Illinois Supreme Court had erred in upholding the disallowance of a claim in an insurance liquidation proceeding that had been based on a judgment rendered against the liquidator in a Missouri court. 329 U.S. at 550-54. The Court explained that the "establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court." 329 U.S. at 549. Thus, the Court held, "the notion that . . . control over

³⁹ This rule of priority arises from practical necessity. When two courts simultaneously assert *in rem* or *quasi in rem* jurisdiction over the same property, one court must yield to the other with regard to an *in rem* or *quasi in rem* claim if either is to "have possession or control of the property which is the subject of the suit in order to proceed with the cause and grant the relief sought." *Penn General*, 294 U.S. at 195; *see Kline*, 260 U.S. at 235. Contrary to the Liquidator's suggestion, Pet'r Br. 7-8 n.18, a suit "to establish a debt" is strictly *in personam*, *U.S. v. Bank of N.Y.*, 296 U.S. 463, 478 (1935), and is therefore unlike a suit to "marshal assets," which involves the enforcement of liens against specific property, *see, e.g., Sowell v. Federal Reserve Bank*, 268 U.S. 449, 456-457 (1925), thus requiring the court to "control the property" in order "to give effect to its jurisdiction," *Bank of N.Y.*, 296 U.S. at 477. The only assets of Mission involved in this action are its contract claims. Allstate does not dispute the Liquidator's control over those claims, but merely seeks to defend against them as an adverse party. *See Kinder*, 78 Cal. App. 3d at 580-581, 144 Cal. Rptr. at 295-296.

proof of claims is necessary for the protection of the exclusive jurisdiction of the court over the property is a mistaken one." *Id.*⁴⁰

The Court relied on this principle in *Coit Independence Joint Venture*, in which it held that a suit against the Federal Savings and Loan Insurance Corporation in its capacity as a receiver of an insolvent savings and loan association did not "restrain or affect" the exercise of the FSLIC's receivership functions within the meaning of the applicable statute. 489 U.S. at 574-77. Examining the background against which the statute had been enacted, the Court observed that "it was well established at common law that suits establishing the existence or amount of a claim against an insolvent debtor did not interfere with or restrain the receiver's possession of the insolvent's assets or its exclusive control over the distribution of assets to satisfy claims. *Id.* at 575, citing *Morris*, 329 U.S. at 549; *Riehle*, 279 U.S. at 224; and *Bank of Bethel*, 14 Wall. at 401-402.⁴¹

⁴⁰ See, e.g., *Bank of N.Y.*, 296 U.S. at 478 (suit "to establish a debt" against insurer in liquidation, unlike suit to recover possession of the *res* in the control of the liquidation court, can be adjudicated "without disturbing the control of the state court"); *Riehle*, 279 U.S. at 224 ("[t]here is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res*"); see also *Markham v. Allen*, 326 U.S. 490, 494-95 (1946) (*in personam* federal suits by and against probate administrator do not interfere with state court's jurisdiction over estate or violate probate exception to federal jurisdiction); *Princess Lida v. Thompson*, 305 U.S. 456, 467 (1938) ("an action in federal court to establish the validity or the amount of a claim [against trust under state court control] constitutes no interference with a state court's possession or control of a *res*"); *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613, 617-620 (1936) (*in personam* federal suit by receiver of insolvent bank to establish right to participate in trust does not disturb state court's *in rem* control over trust assets).

⁴¹ Against this background, it is clear that the Liquidator reads too much into *Penn General* and *Pennsylvania v. Williams*. See Pet'r Br. 43-45. In *Penn General*, a federal-court equity receivership had been

By complaining that federal adjudication of his action against Allstate would unduly interfere with the conduct of the liquidation proceeding, the Liquidator simply recasts in *Burford* guise an argument that this Court has rejected in *Coit*, *Morris*, and the long line of decisions they represent. If the Liquidator could not have complained about defending a claim against the Mission estate outside the liquidation court, surely he cannot complain about having to pursue his own claim against a third party there. As the Court said in *Morris* with respect to the full faith and credit statute, so too with respect to the diversity statute: neither contains an "exception in case of liquidations of insolvent insurance companies." 329 U.S. at 553. Simply put, the Liquidator's argument from "convenience in administration," *id.*, cannot defeat Allstate's right to invoke the diversity jurisdiction of the District Court.

2. The Presence of State-Law Issues Cannot Defeat Allstate's Right to Invoke Diversity Jurisdiction.

The Liquidator also contends that the presence of important state law issues justified the District Court's remand order. Pet'r Br. 5-6. The Liquidator misconceives the role of state law and policy in the *Burford* doctrine, which is concerned not with preventing federal courts from deciding important issues of state law, but with preventing them from displacing state courts when they are providing specialized review of

commenced against an insolvent insurer. The Court held that the federal court sitting in equity, "in the exercise of judicial discretion," could relinquish control over the insurer's assets to a state court that had appointed the state insurance commissioner as statutory liquidator, even though the federal court had acquired jurisdiction first. 294 U.S. at 194-99; see also *Pennsylvania v. Williams*, 294 U.S. at 182-86 (companion case; liquidation of building and loan society). But the Court stressed in *Penn General* that the jurisdiction of whichever court ended up with *in rem* control of the assets was "exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property." 294 U.S. at 198; see *Commonwealth Trust Co.*, 297 U.S. at 619-20 (doctrine of *Penn General* and *Pennsylvania v. Williams* has no application to *in personam* claims).

state administrative policymaking on matters of peculiarly local concern. *See* Part II.A, above. The Liquidator's argument simply dresses up in *Burford* rhetoric an assumption that, as this Court has repeatedly held, conflicts with the very basis of diversity jurisdiction.

A federal court has a bedrock obligation to decide issues of state law—easy or hard, settled or unsettled—arising in the cases that come before it. *Meredith v. City of Winter Haven*, 320 U.S. 228, 236 (1943); *see also* *McNeese v. Board of Educ.*, 373 U.S. 668, 673 n.5 (1963); *Propper v. Clark*, 337 U.S. 472, 489-90 (1948). Indeed, “[t]he very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge.” *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991), citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Even setting aside the District Court's obligation to decide, as a threshold matter, Allstate's motion to compel arbitration under the Federal Arbitration Act, *see* Part II.C, below, this case would do no more than require the District Court to fulfill that bedrock obligation. Even if the Court were to deny the motion to compel arbitration and reach the underlying issues of liability, it would have to apply only the common law of contract; defenses based on contract language and principles such as statutes of limitations; the statutory right of setoff; or whatever other principles the parties might urge the Court to apply. Decisions on such issues constitute the everyday fare of a district court. *See Grode v. Mutual Fire*, 8 F.3d at 959.⁴²

⁴² While the Liquidator repeatedly refers to the supposed complexity of the insurance insolvency provisions of the California Insurance Code, he makes no attempt to explain why the District Court, if required to do so, would be incapable of reaching “the correct application and interpretation,” Pet'r Br. 6, of the setoff provision, Cal. Ins. Code § 1031, or the California Supreme Court's recent construction of that provision in *Prudential Reinsurance*, 3 Cal. 4th at 1136-37, 842 P.2d at 59-60, 14 Cal. Rptr. 2d at 761. Occupying less than a single page of text, the sec-

The Liquidator also argues that he has a right to protection against “multiple litigation in multiple jurisdictions with varying interpretations of California law and policy.” Pet'r Br. 48; *see also id.* at 9, 14, 47. He thereby echoes the District Court, which based its *Burford* holding on a determination that California's “overriding interest in regulating insurance insolvencies and liquidation in a uniform and orderly manner . . . could be undermined by inconsistent rulings from the federal and state courts” on “the hotly contested set-off issue.” Pet. App. 34a. It is well settled, however, that “the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction.” *Colorado River*, 424 U.S. at 816. Were the rule otherwise, any party facing repetitive litigation on identical claims would be able to seek dismissal of suits in one or several courts in favor of suits pending elsewhere involving similar issues. Notwithstanding the Liquidator's lament, the risk of inconsistent adjudications on identical issues is a risk that inheres in any multicourt system, including the multiple courts of a single state, the independent judicial systems of the several states, or the dual judicial systems of the state and federal governments.

By trumpeting the objective of California law to protect insurance policyholders, the Liquidator comes close to asserting that California has an interest in the *outcome* of this suit. Pet'r Br. 48; *see also* Pet. App. 15a. But the Liquidator cannot mean to suggest that California would have any interest in this dispute beyond ensuring its fair and just adjudication. By diligently proceeding to resolve the case by deciding the issues as they arose, the District Court would ensure the vindication of any state policies reflected in applicable California law.

tion is patterned after the setoff provision of the federal Bankruptcy Act of 1898, codifies the common-law right of setoff, and contains no references to arcane concepts of insurance regulation. *See id.* at 1123-24, 842 P.2d at 50, 14 Cal. Rptr. 2d at 751.

C. The District Court Had No Discretion to Abstain in the Face of Allstate's Motion to Compel Arbitration Under the Federal Arbitration Act.

Immediately after removing this case to federal court, Allstate filed a motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 2-4, J.A. 77-110. As this Court has repeatedly explained, that Act reflects "an emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); see, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1215-16 (1995).⁴³

Sections 3 and 4 of the Act give the federal policy teeth. Those sections implement "Congress' clear intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983). Thus, when faced with a motion to compel arbitration, the court "may consider only issues relating to the making and enforcement of the agreement to arbitrate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that dis-

⁴³ As the treaties at issue here reflect, J.A. 108-09, arbitration is the virtually universal means of dispute resolution in the reinsurance industry. Ronald A. Jacks, *Arbitration and Insurer Insolvencies*, in ABA, *Law and Practice of Insurance Company Insolvency* 260 (1986). Believing strongly in the efficiency and fairness of industry arbitration, Allstate has consistently and vigorously sought to vindicate its right under the Federal Arbitration Act to ready enforcement of agreements to arbitrate. See, e.g., *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1994) (enforcing right under reinsurance contract arbitration clause to appoint arbitrator upon adverse party's failure to do so in timely manner); *North River Ins. Co. v. Allstate Ins. Co.*, 866 F. Supp. 123 (S.D.N.Y. 1994) (holding arbitrable collateral estoppel issues pursuant to arbitration clause in reinsurance contract); *Ainsworth v. Allstate Ins. Co.*, 634 F. Supp. 52 (W.D. Mo. 1985) (holding enforceable against liquidator of insolvent insurer arbitration clause in reinsurance contract).

trict courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). In short, courts must implement the Act in a manner that prevents a party resisting arbitration from generating the kind of "prearbitration litigation that would frustrate the very purpose of the statute." *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 843 (1995) (O'Connor, J., concurring); see also *id.* at 841-42 (opinion of the Court); *Moses H. Cone*, 460 U.S. at 23 (emphasizing "statutory policy of rapid and unobstructed enforcement of arbitration agreements").

Even if the *Burford* doctrine might otherwise apply in an action to collect money on a contract, it surely cannot apply in the face of a motion to compel arbitration under the Federal Arbitration Act. See *Moses H. Cone*, 460 U.S. at 23-26. Not only does such a motion seek no restraint on the enforcement of a state administrative order, but it is inconceivable that a decision on such a motion by a federal court would disrupt the development of uniform state policy in an area of peculiarly local concern. See *NOPSI*, 491 U.S. at 361-62.

The Liquidator nevertheless suggests that the *Burford* doctrine might apply here because the post-liquidation enforceability of agreements to arbitrate "is an unsettled question under California law." Pet'r Br. 5; see *id.* 26. The enforceability of arbitration agreements, however, is a matter of federal law. Even if California law purported to render agreements to arbitrate unenforceable against the liquidator of an insolvent insurance company,⁴⁴ it would remain a ques-

⁴⁴ Neither the California Insurance Code nor the California Arbitration Act contains any provision purporting to have that effect, and the Liquidator can point to no reported California decision holding that they do. To the contrary, the California courts have held that a liquidator "steps into the shoes of the insolvent insurer, taking the relevant claims and defenses as he finds them," *Prudential Reinsurance*, 3 Cal. 4th at 1136-37, 842 P.2d at 59, 14 Cal. Rptr. 2d at 760; see *Texas Commerce*

tion of federal law whether the antipreemption provision of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), insulated such a provision from the otherwise preemptive effect of the Federal Arbitration Act. *See Terminix*, 115 S. Ct. at 838-39; *Perry v. Thomas*, 482 U.S. 483, 489-90 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984).

As *NOPSI* makes clear, a federal court may not abstain from deciding a question of federal preemption. 491 U.S. at 362-63; *see Moses H. Cone*, 460 U.S. at 23-26. At a minimum, the District Court had no discretion to remand the case to the state court without deciding Allstate's motion to compel arbitration under the Federal Arbitration Act.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should therefore be affirmed.

Respectfully submitted,

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Bank, 28 Cal. App. 4th at 1245-1246, 34 Cal. Rptr. 2d at 162; *H.D. Roosen Co. v. Pacific Radio Pub. Co.*, 123 Cal. App. 525, 534, 11 P.2d 873, 876 (1932).

APPENDIX

APPENDIX

28 U.S.C. § 1291 provides:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

JAN 31 1996

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE
COMPANY TRUST, MISSION NATIONAL INSURANCE
COMPANY TRUST, ENTERPRISE INSURANCE COMPANY
TRUST, HOLLAND-AMERICA INSURANCE COMPANY
TRUST AND MISSION REINSURANCE CORPORATION TRUST,
Petitioner,

v.

ALLSTATE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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25 PP

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RESPONSE TO ALLSTATE'S ARGUMENT THAT THE REMAND ORDER WAS RE- VIEWABLE BY APPEAL	3
III. RESPONSE TO ALLSTATE'S ARGUMENT REGARDING THE PROPRIETY OF ABSTEN- TION	5
A. This Is Not an Ordinary <i>In Personam</i> Action Against a Private Party	7
B. The Administration of Abstention Doctrines Depends on a Reasoned Analysis, Not a Mechanical Checklist	12
C. The Abstention Doctrine Should Not Depend on an Out-Dated Law/Equity Distinction.....	14
D. Allstate's Assertion that the District Court Had No Jurisdiction to Abstain Because All- state Sought No Injunctive Relief	15
E. The Need for a Consolidated Forum	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	Page
<i>20th Century Ins. Co. v. Garamendi</i> , 8 Cal. 4th 216, 878 P.2d 566, 32 Cal. Rptr. 2d 807 (1994), <i>cert. denied</i> , 513 U.S. —, 115 S. Ct. 1106 (1995).....	7
<i>Alpha Beta Food Mkts., Inc. v. Retail Clerks Union</i> , 45 Cal. 2d 764, 291 P.2d 433 (1955)	8
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943).....	1
<i>California State Auto. Ass'n Inter-Ins. Bureau v. McLoney</i> , 341 U.S. 105 (1951)	7
<i>Carpenter v. Pacific Mut. Life Ins. Co.</i> , 10 Cal. 2d 307, 74 P.2d 761 (1937), <i>aff'd sub nom. Neblett v. Carpenter</i> , 305 U.S. 297 (1938)	7, 8
<i>Checker Motors Corp. v. Superior Court</i> , 13 Cal. App. 4th 1007, 17 Cal. Rptr. 2d 618 (1993).....	9, 17, 18
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949)	5
<i>Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.</i> , 489 U.S. 561 (1989)	9
<i>Commonwealth Trust Co. v. Bradford</i> , 297 U.S. 613 (1936)	9, 10
<i>Corcoran v. Ardra Ins. Co., Ltd.</i> , 657 F. Supp. 1223 (S.D.N.Y. 1987)	3
<i>Doughty v. Underwriters at Lloyds, London</i> , 6 F.3d 856 (1st Cir. 1993)	3
<i>Fair Assessment in Real Estate Ass'n v. McNary</i> , 454 U.S. 100 (1981)	2
<i>Farmer's Loan & Trust Co. v. Lake S.E.R. Co.</i> , 177 U.S. 51 (1900)	9
<i>Garamendi v. Executive Life Ins. Co. (Morgan Stanley Mortgage Capital, Inc.)</i> , 17 Cal. App. 4th 504, 21 Cal. Rptr. 2d 578 (1993)	8, 10
<i>German Alliance Ins. Co. v. Lewis</i> , 233 U.S. 389 (1914)	7
<i>Gulfstream Aerospace Corp. v. Mayacamas Corp.</i> , 485 U.S. 271 (1988)	15
<i>Hal Roach Studios, Inc. v. Richard Feiner & Co.</i> , 896 F.2d 1542 (9th Cir. 1989)	8
<i>Kaiser Steel Corp. v. W.S. Ranch Co.</i> , 391 U.S. 593 (1968)	2

TABLE OF AUTHORITIES—Continued

	Page
<i>Lauro Lines s.r.l. v. Chasser</i> , 490 U.S. 495 (1989) ..	4
<i>Law Enforcement Ins. Co. v. Corcoran</i> , 807 F.2d 38 (2nd Cir. 1986), <i>cert. denied</i> , 481 U.S. 1017 (1987)	13
<i>Louisiana Power & Light Co. v. Thibodaux</i> , 360 U.S. 25 (1959)	6
<i>Markham v. Allen</i> , 326 U.S. 490 (1946)	9
<i>McNeese v. Board of Education</i> , 373 U.S. 668 (1963)	13
<i>In re Mission Insurance Company (Imperial Casualty)</i> , 48 Cal. Rptr. 2d 209 (1995)	1
<i>Moore v. Sims</i> , 442 U.S. 415 (1970)	14
<i>Morgan Stanley Mortgage Capital v. Insurance Comm'r</i> , 18 F.3d 790 (9th Cir. 1994)	10, 12, 14, 19
<i>Morris v. Jones</i> , 329 U.S. 545 (1947)	9
<i>Moses H. Cone Memorial Hospital v. Mercury Construction Corp.</i> , 460 U.S. 1 (1983)	13
<i>Nebbia v. New York</i> , 291 U.S. 502 (1934)	7
<i>Osborn v. Ozlin</i> , 310 U.S. 53 (1940)	7
<i>Penn Gen. Casualty Co. v. Pennsylvania</i> , 294 U.S. 189 (1935)	13
<i>Pennsylvania v. Williams</i> , 294 U.S. 176 (1935)	13, 14
<i>Prudential Reinsurance Co. v. Superior Court (Garamendi)</i> , 3 Cal. 4th 1118, 842 P.2d 48, 14 Cal. Rptr. 2d 749 (1992)	1
<i>Railroad Comm'n v. Pullman</i> , 312 U.S. 496 (1941) ..	4
<i>Ross v. Bernhard</i> , 396 U.S. 531 (1970)	7
<i>Thermtron Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336 (1976)	4, 5
<i>Things Remembered, Inc. v. Petrarca</i> , 516 U.S. —, 116 S. Ct. 494 (1995)	4, 5, 7
<i>Underwriters Nat'l Assurance Co. v. North Carolina Life & Acc. & Health Ins. Guar. Ass'n</i> , 455 U.S. 691 (1982)	19
<i>United States v. Bank of New York & Trust Co.</i> , 296 U.S. 463 (1936)	9, 18
<i>Webster v. Superior Court</i> , 46 Cal. 3d 338, 758 P.2d 596 (1988)	18

TABLE OF AUTHORITIES—Continued

	Page
STATUTES	
15 U.S.C. §§ 1011-1015	10
28 U.S.C. § 1447 (c)	4
28 U.S.C. § 1447 (d)	4, 5
Cal. Ins. Code § 1011	7
Cal. Ins. Code § 1020	18, 19
Cal. Ins. Code § 1031	1
Cal. Ins. Code § 1058	18
Cal. Ins. Code § 1059	7
Cal. Ins. Code § 1063.14	12
RULES	
SUP. CT. R. 14.1 (a)	1
FED. R. CIV. PROC. 2	7
OTHER AUTHORITIES	
Michael E. Solimine, <i>Removal, Remands and Reforming Federal Appellate Review</i> , 58 Mo. L. Rev. 287 (1993)	5
Joan Steinman, <i>Removal, Remand and Review in Pendent Claim and Pendent Party Cases</i> , 41 Vand. L. Rev. 923 (1988)	5
<i>Failed Promises: Insurance Company Insolvencies</i> , Committee Print 101-P. 101st Cong., 2d Sess. (1990)	8

REPLY BRIEF FOR THE PETITIONER

I. INTRODUCTION

The Commissioner's Opening Brief adequately addresses most of the points discussed in the Briefs of Allstate and the *Amici Curiae*. This Reply Brief For The Petitioner primarily focuses on several new issues introduced by Allstate and its *Amici*.¹

This Court granted Certiorari on two issues. In violation of this Court's Rule 14.1(a), however, Allstate has attempted to restate and change the substance of the second issue before this Court.

The opinion of the Ninth Circuit was succinctly limited:

This case presents two questions: First, whether a remand order based on abstention is reviewable, and, if so, whether it can be reviewed on appeal, or only by a petition for a writ of mandamus. Second, and more importantly, we consider whether the Burford abstention doctrine allows a federal court to surrender jurisdiction to a state court in a case in which no equitable relief is sought.

Pet. App. p. 2a. Further, the Ninth Circuit specifically stated that it did not reach the question of whether this case met the requirements for abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Pet. App. p. 8a n.8.

¹ In his Opening Brief, p. 5 n.13, the Commissioner referred to a then-pending appeal before the California Court of Appeal, *Imperial Casualty & Indemnity Co. v. Insurance Commissioner of the State of California*, case number B083725. In December 1995, that case was decided in the Commissioner's favor. *In re Mission Insurance Company (Imperial Casualty)*, 48 Cal. Rptr. 2d 209 (1995). The primary basis of that opinion rested on the specific provisions of a settlement agreement between the Commissioner and Imperial. Thus, that particular open dispute is resolved. However, other disputes concerning the proper application of *Prudential Reinsurance Co. v. Superior Court (Garamendi)*, 3 Cal. 4th 1118, 842 P.2d 48, 14 Cal. Rptr. 2d 749 (1992), and California Ins. Code § 1031 remain open.

The second issue upon which this Court granted Certiorari is:

Whether the court below erred in holding that the abstention powers of federal courts are limited to actions in equity, or alternatively, whether that court erred in limiting the exercise of *Burford* abstention solely to actions in equity.

Although under this Court's rules, an issue fairly included within the issues before the Court may be raised, Allstate seeks to change the focus of the second issue by suggesting this case is not "public" and is no more than an ordinary damage suit against a private party. Allstate's version of the second issue is:

Whether an action at law against a private party seeking money damages can present the exceptional circumstances necessary for a federal court to decline to exercise its jurisdiction based on the *Burford* doctrine.

Brief for Respondent, p. (i).

Thus, Allstate attempts to alter the question before the Court from one involving the fundamental power and discretion of the federal district court to abstain in any case "at law" to a dispute over whether the *Burford* abstention doctrine may apply to a damage case involving private parties.² This effort to transform the issue is inappropriate and for the reasons discussed below, Allstate (with the support of its *Amici*, see, e.g., Brief of Nat'l Ass'n of Indep. Insurers, et al., at p. 14) cannot successfully characterize either the Commissioner or Allstate as merely private parties in the context of this case.

² Even this different issue is not an open one because this Court has already applied abstention doctrines to actions between "private" parties. For example, *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), involved private plaintiffs seeking actual and punitive damages against tax officials in their "private" capacities. See also *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968).

II. RESPONSE TO ALLSTATE'S ARGUMENT THAT THE REMAND ORDER WAS REVIEWABLE BY APPEAL

At page 10 of its Brief, Allstate enunciates the crux of its argument on the first issue as follows:

A remand based on the *Burford* doctrine satisfies the most basic principles of finality because it ends the litigation in the district court and leaves that court with nothing further to do. Because the remand order here put Allstate "effectively out of federal court"—indeed, put Allstate expressly and literally out of federal court—it was final and appealable under Sec. 1291.

Allstate's assumption that it is "effectively out of federal court" is not necessarily true. Moreover, this case began in state court and, under the remand order, the same case would proceed in the same state court. Allstate's wish to be in an arbitration proceeding, rather than federal or state court, may or may not be granted by the state court. If the proceedings in the state court eventually deny some federal right to arbitrate, then Allstate may seek to adjudicate in federal court such federal questions as may then exist. Indeed, since Allstate claims the right to arbitrate under a contract provision, it is possible Allstate may assert a federal law issue under the Federal Arbitration Act and/or the Contract Clause of the Constitution. Those issues are not yet ripe, however, since they depend on antecedent issues of uncertain state law, and Allstate cannot show it is "effectively out of federal court." To be sure, Allstate's desire to have a federal court rule on the issue of arbitrability may be delayed, but it may also become moot.³ Assuming *arguendo*, that it

³ Allstate's alleged right to arbitrate is an open and complex issue under both state and federal law. See, e.g., *Corcoran v. Ardra Ins. Co., Ltd.*, 657 F. Supp. 1223 (S.D.N.Y. 1987); *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993). Indeed, the antecedent state law issue and its uncertainty are effectively acknowledged in the *amicus* brief of the Reinsurance Ass'n, et al. at p. 23 n.20. Allstate argues that it is irrelevant that the issue is undecided under state law, but the fact that an alleged federal question, par-

does not become moot, but is merely delayed, that delay is insufficient to render the remand order appealable. See, e.g., *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989); Commissioner's Opening Brief, pp. 26-27.

In *Thermtron*, this Court squarely held that "an order remanding a removed action does not represent a final judgment reviewable by appeal," but only (in a proper case) by mandamus. 423 U.S. at 352. In *Things Remembered, Inc. v. Petrarca*, 516 U.S. —, 116 S. Ct. 494, 496 (1995), this Court recently confirmed its position in *Thermtron* that only those remand orders within 28 U.S.C. § 1447(c) are barred from appellate review under 28 U.S.C. § 1447(d). However, the Court also noted that "Congress has placed broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court."⁴ Further, the Court did not hold that all remand orders not barred by 28 U.S.C. § 1447(d) are appealable; nor did it retract *Thermtron's* rule that a remand order is not a final appealable judgment and may be reviewed only by mandamus.

ticularly a Constitutional law issue, might be mooted in the pending state court litigation is certainly one of the factors, among others, that a district court may consider in determining whether or not to abstain. See, e.g., *Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941). Further, though not necessarily controlling, it is at least pertinent to note that Allstate did not (and could not) remove on the basis of a federal question, but rather on the basis of diversity of citizenship . . . a basis that existed only because of the fortuity that the Commissioner, instead of the state agency itself, is designated as liquidator and trustee by state law.

⁴ See also *Things Remembered*, 116 S. Ct. at 500 (Ginsburg, J., concurring: "In sum, a 'strong congressional policy against review of remand orders' . . . underlies Sections 1447(d) and 1452(b)" (citing, *inter alia*, *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987) ("The [analysis suggested to that court] turns on a sort of semantic crack in the statute rather than a sound appreciation of the strong congressional policy against review of remand orders.")).

Unless the Court were now to hold that all remand orders are final orders, remand orders should not normally be reviewable by appeal. The exception, if any, to this general rule would be the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). If this remand order qualifies under *Cohen*, then all remand orders not appeal-barred by Section 1447(d) could be appealed.⁵ The result would be to increase the number of appeals in the federal system, perhaps by several thousand cases a year,⁶ and significantly broaden the "narrow exception" the Court recognized in *Cohen*. Whether or not any remand order could ever qualify under the *Cohen* exception, this one does not.

III. RESPONSE TO ALLSTATE'S ARGUMENT REGARDING THE PROPRIETY OF ABSTENTION

The effect of the Ninth Circuit decision is that a district court may *never* abstain unless the underlying pleading asserts a case "in equity" within the meaning of the ancient distinction between law and equity. Although the Ninth Circuit specifically referred to *Burford* abstention, its rationale is far broader and rests on the concept that a district court may not abstain except as a matter of the

⁵ The Commissioner believes it would be better to view all remand orders as within the bar of Section 1447(d) and by no means concedes the opposite. See Commissioner's Opening Brief, pp. 29-30, and n.52. The Commissioner is aware that *Thermtron* holds otherwise, in the context of its particular facts, but as stated in a concurring opinion in *Things Remembered*, the applicability of the *Thermtron* exception in other contexts (such as this), remains open. See 116 S.Ct. at 498 (Kennedy, J., concurring). See also Joan Steinman, *Removal, Remand and Review in Pendent Claim and Pendent Party Cases*, 41 Vand. L. Rev. 923, 1004 (1988), distinguishing *Thermtron* from discretionary remand orders). To the extent that holding is found to be in issue in this case, the Commissioner wishes to make his position clear.

⁶ Michael E. Solimine, *Removal, Remands and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287, 289 (1993).

court's "discretion to decline or grant equitable relief." Pet. App. p. 10a.

The utter inflexibility of the Ninth Circuit rule is completely at odds with the nature and purpose of the abstention doctrine. The Commissioner *agrees* with the Ninth Circuit that, in order to abstain, a district court must exercise its "discretion to decline or grant equitable relief." Pre-merger, a district court arguably could grant equitable relief only when it sat in equity as a result of the underlying suit being "in equity." However, under the merged federal system, a district court that has jurisdiction *always* sits in both law and equity.

The granting of the Commissioner's motion seeking remand of this case *was* the exercise of the district court's discretion to grant equitable relief. Under modern procedure, the propriety of a district court's exercise of its equity powers depends on the circumstances of the particular case before it. To etch upon abstention principles an arbitrary and outdated rule that *must* be applied in all cases for all time, regardless of individual circumstances, would be an abdication of the important judicial duty to protect "Our Federalism." This duty deserves the same degree of fealty as a court's general obligation to exercise its jurisdiction.

Allstate never even attempts to distinguish this Court's statement in *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28 (1959), that:

These prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism. We have drawn upon the judicial discretion of the chancellor to decline jurisdiction over a part or all of a case brought before him.

Further, Allstate has not explained why the district court in this case was not "sitting in equity" when it remanded this case, given current federal rules of civil

procedure; particularly Federal Rule 2 and this Court's holding in *Ross v. Bernhard*, 396 U.S. 531 (1970).⁷

Instead, Allstate apparently advances the novel concept that the Commissioner is not really a public official in the context of this case and that this is an *in personam* suit to establish a debt between private parties. This position avoids the fundamental question presented in the Petition for Certiorari, and as shown in Part A below, it is also wrong.

A. This Is Not an Ordinary *In Personam* Action Against a Private Party

It is well-settled that insurance is a public asset and a business which affects the vital public interest. Contracts of insurance and reinsurance have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. See, e.g., *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 413 (1914); *Nebbia v. New York*, 291 U.S. 502, 523 (1934); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940); *California State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109 (1951).

The law is clear that the Commissioner acts in his official capacity as an officer of the state in connection with the underlying proceedings. Cal. Ins. Code §§ 1011, 1059; *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 240, 878 P.2d 566, 580, 32 Cal. Rptr. 2d 807, 821 (1994), *cert. denied*, 513 U.S. —, 115 S. Ct. 1106 (1995); *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal. 2d 307, 329, 74 P.2d 761, 774-75 (1937), *aff'd sub nom. Neblett v. Carpenter*, 305 U.S. 297 (1938).

In the present context, neither the Commissioner *nor* Allstate may be viewed simply as a "private individual." It may be true that Allstate enters into a private contract

⁷ See also Commissioner's Opening Brief, pp. 19, 33-35, and see *Things Remembered*, 116 S.Ct. at 498-99 (Ginsburg, J., concurring, emphasizing the significance of merger in the context of references to "equitable" grounds.).

when it purchases a company car, or contracts for its paper and pencils, but Allstate enters into publicly regulated and controlled contracts when it issues insurance policies or assumes reinsurance obligations. *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal. 2d at 329, 74 P.2d at 775 ("Insurance is a public asset, a basis of credit, and a vital factor in business activity."); *Garamendi v. Executive Life Ins. Co. (Morgan Stanley Mortgage Capital, Inc.)*, 17 Cal. App. 4th 504, 515, 21 Cal. Rptr. 2d 578, 585 (1993) ("The interest of a particular individual policyholder aside, insurance is a public asset and the public has an important stake in preserving the business.").

Indeed, all relevant insurance law of California is deemed to be a part of all of Allstate's insurance and reinsurance contracts, including its agreements with the Mission Companies. See *Alpha Beta Food Mkts., Inc. v. Retail Clerk's Union*, 45 Cal. 2d 764, 771, 291 P.2d 433, 437 (1955); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1548 (9th Cir. 1989).

The background of the underlying proceedings is detailed in the Commissioner's Opening Brief, pp. 2-16, a discussion that Allstate does not materially dispute.⁸

⁸ Allstate disputes that the downfall of the Mission Companies was the fault of the reinsurers and in its Brief at p. 6 n.4 goes outside the record to cite to a highly political and incorrect document produced by the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce entitled *Failed Promises: Insurance Company Insolvencies*, Committee Print 101-P. 101st Cong., 2d Sess. (1990). That document was produced after the most cursory of investigations which never actually focused upon the operations of the Mission Companies, but dealt with an affiliated general agency and the parent company, Mission Insurance Group, Inc. In the *amicus* brief of the Reinsurance Ass'n, et al. at p. 5 n.6, a similarly motivated reference is made to a tentative ruling of a panel acting under the auspices of the Receivership Court. But on December 28, 1995, the Receivership Court completely rejected this panel's tentative decision and refused to give it any effect, in the process referring to the decision as "comic." Apparently, Allstate and the *Amici* are attempting to suggest that the four separate Insurance Commissioners who have been

Despite this, Allstate and its *amici* appear to argue that a suit by a state insurance commissioner, acting to marshal assets under a special proceeding in the exercise of California's police power is somehow converted to an *in personam* damage suit between private individuals. However, this Court recognized the insupportability of this premise in *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477 (1936). The underlying action is a suit to marshal and liquidate assets and is intimately connected with the liquidation proceedings. And in *Bank of New York*, this Court squarely characterized state court receivership proceedings, including suits to marshal assets and liquidate estates, as *quasi in rem*.⁹

in charge of these proceedings for almost 10 years have all acted incorrectly and have had no valid grounds to require a turnover of the Reinsurance Recoverables. However, the fact that several hundred very sophisticated reinsurers have paid over \$1.2 Billion to the Commissioners speaks eloquently in support of the rectitude of the Commissioners' positions and against the suggestions of Allstate and the *Amici*.

⁹ See also *Farmer's Loan & Trust Co. v. Lake S.E.R. Co.*, 177 U.S. 51, 61 (1900) to the same effect. The Commissioner widely cited *Bank of New York* in his Opening Brief, and included an extensive quotation at p. 7 n.18, but Allstate had no answer other than to ignore it. See also *Checker Motors Corp. v. Superior Court*, 13 Cal. App. 4th 1007, 17 Cal. Rptr. 2d 618 (1993) where that court noted state law recognizes "California's strong interest in preserving the assets of its policyholders and the insolvency court's interest in maintaining control over all of the insolvent insurance company's assets. . . ." *Id.* at 102.

At the same time, Allstate and its *Amici* cite several inapposite cases to support their position. See, e.g., *amicus* Brief of the Reinsurance Ass'n, et al., pp. 18-19. *Morris v. Jones*, 329 U.S. 545, 549 (1947) has a narrow holding on a completely different set of facts and supports the Commissioner's argument that the injunctions issued by the state court in this case are entitled to full faith and credit. *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561 (1989) is not on point. It merely held that the FSLIC did not have the power to usurp the power of the courts. *Markham v. Allen*, 326 U.S. 490 (1946) is not an abstention case, it merely held that the district court did have jurisdiction, a prerequisite to abstaining. *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613 (1936) strongly supports the Com-

In *Morgan Stanley Mortgage Capital v. Insurance Comm'r*, 18 F.3d 790 (9th Cir. 1994), the Ninth Circuit made exactly such a ruling and, in the process, refuted the position that this is merely a private suit. That case involved the insolvency proceedings of Executive Life Insurance Company, the same California statutory scheme as the instant case and virtually the same state court orders and injunctions as those issued here which assumed sole and exclusive jurisdiction over all the insolvent insurer's assets and all suits or claims against those assets.

In *Morgan Stanley*, the Ninth Circuit held that the reach of the state receivership court's jurisdiction was broad enough to encompass the insolvent insurer's interests in certain underlying partnerships even though those entities were not insurance companies. *Id.* at 794. That court acknowledged the strong public policy involved in insurance receivership proceedings and held that the state receivership court must have jurisdiction equally as broad as the jurisdiction of bankruptcy courts. *Id.* at 794. Indeed, the Ninth Circuit relied, among other authorities, on the clear Congressional intent expressed by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 to defer to state insurance regulation.

Also, the Ninth Circuit cited, with approval, the related California Court of Appeal case of *Garamendi v. Executive Life Ins. Co. (Morgan Stanley Mortgage Capital, Inc.)*, 17 Cal. App. 4th 504, 21 Cal. Rptr. 2d 578 (1993) where the court among other things, noted that the proper jurisdiction of disputes over the insolvent insurer's assets was in the receivership court, that the receivership court has broad power to issue injunctions to protect the insurer's assets, and that the public has an interest in the orderly liquidation of an insurer. *Executive Life*, 17 Cal. App. 4th at 515, 21 Cal. Rptr. 2d at 585.

missioner because it states that the court did have jurisdiction which it should exercise unless "required by rules based on comity to relegate the complainant to state court." *Id.* at 602.

Allstate does not dispute the discussion in the Commissioner's Opening Brief as to the key public nature of the Reinsurance Recoverables (Commissioner's Opening Brief, pp. 8-17), which are carried on the books of insurers *as assets* of the reinsured company and are, thus, in essence, public assets. Allstate must be presumed to have known and intended that its reinsurance obligations would be deemed assets of the Mission Companies and would be relied upon by the public and the regulators in permitting the Mission Companies to continue to do business.¹⁰

It is certainly a matter of public concern when Allstate attempts to avoid its contractual obligations after permitting the public and the insurance regulators to rely upon the Reinsurance Recoverables as assets and to believe they were "in good hands with Allstate."¹¹

Upon the insolvency of the Mission Companies, Allstate filed claims in the underlying state court insolvency proceedings. It withheld from the Commissioner, acting as a public official, the Reinsurance Recoverables which are in *custodia legis* of the state court, title to which

¹⁰ Allstate's reinsurance contracts with the Mission Companies include an "Insolvency Clause" which clearly contemplates that Allstate will be subject to the California insolvency statutes in the event of the insolvency of any of the Mission Companies. This clause, which is quoted in the Commissioner's Opening Brief, p. 49 n.93 (*see also, e.g.,* Jt. App. pp. 109-110), mandates, upon insolvency of the reinsured company, the payment of the reinsurance recoverables *without diminution* to the liquidator.

¹¹ The public and the State of California have a vital interest in these contracts. Much of the insurance in question was for large commercial risks and for workers compensation. There are hundreds of thousands of innocent individuals who are reliant upon the efficacy of the policies in question. These are not mere "private contracts" but are public contracts where individuals with severe workers compensation claims, with diseases from toxic shock, agent orange, breast implants, asbestos, PCP and various toxic environmental problems were made to rely upon the availability of the Reinsurance Recoverables from Allstate and the other reinsurers. Allstate and the Mission Companies operated under these contracts for over 17 years prior to this receivership.

was transferred to the Commissioner by operation of law, and sole and exclusive jurisdiction over which was assumed by valid orders of the Receivership Court.

In a further effort to assert that only private matters are at issue here, Allstate falsely claims that the funds needed to pay the covered claims of policyholders under the guaranty association statutes are private funds and come from the insurance companies that are members of the various guaranty associations. This is just not true. As was pointed out in the Commissioner's Opening Brief, p. 13 n.32, the ultimate source of these funds is not the insurance companies, but the public.¹²

In the face of the decision in *Morgan Stanley*, 18 F.3d 790, it is impossible to believe that the Ninth Circuit would have accepted Allstate's new argument that this dispute does not affect California's public interest had Allstate made this argument there. To make this argument now is not only to inject an inappropriate issue, but one that is wholly without merit.

B. The Administration of Abstention Doctrines Depends on a Reasoned Analysis, Not a Mechanical Checklist

Allstate engages, at pages 26-38 of its brief, in a highly technical and mechanical analysis of the *Burford* doctrine. In this effort, Allstate continues to attempt to shift the argument from the question at hand to an issue it would prefer to argue. Rather than confronting head-on the question of whether a district court *ever* has the power to abstain in a case "at law," Allstate expends a great deal of its effort in arguing why the district court should not have made the decision it made in this case.

Allstate's efforts to pigeonhole the abstention doctrines is not productive and only serves to confuse the issues. The abstention doctrines are not to be applied via a mechanical checklist; rather the courts are to conduct a careful balancing of the important factors as they apply in a given case. These factors are to be applied prag-

¹² See, e.g., Cal. Ins. Code 1063.14.

matically with a view to the realities of the case at hand. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16 (1983) and *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 40 (2nd Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987). The fundamental realities of the instant case are that the underlying dispute is firmly "entangled in a skein of state law,"¹³ and is an important and integral part of the insurance insolvency proceedings. These insolvency proceedings are special proceedings which entail various judicial actions and various administrative actions and determinations by the Commissioner.

In attempting to narrowly define a *Burford* pigeon-hole and write the Commissioner out of it, Allstate also sidesteps the fact that prior to this Court's decisions which gave rise to the *Pullman*, *Younger*, *Burford* and *Colorado River* abstention doctrines, it applied abstention-oriented principles in *Penn Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935), and in *Pennsylvania v. Williams*, 294 U.S. 176 (1935). The doctrine established there is uncomplicated. This Court held that a district court may properly relinquish its jurisdiction in favor of a state insolvency official where: i) there is a pending state court proceeding involving an insurance company or a building and loan company; ii) the end sought by that proceeding is the liquidation of a domestic insurance company or building and loan by a state officer; and iii) there is no showing that the interests of creditors and shareholders would not be protected by the state court. Allstate attempts to distinguish the instant case from *Penn General* and *Williams* by asserting that the underlying case is *in personam*. But as noted above, the underlying state proceeding is not *in personam*, it is *in rem* or *quasi in rem*. And even if it were considered *in personam*, that would make no difference. This Court and other courts have recognized that the marshaling of assets is crucial to an effective liquidation process. Thus, an interference with this vital process is

¹³ See *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963).

an interference with the underlying state court proceedings and with the associated administrative activities of the Commissioner as receiver.

Allstate also fails to face this Court's decision in *Moore v. Sims*, 442 U.S. 415, 428 (1970), where it was held:

Few public interests have a higher claim on the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law (citations omitted) or the administration of a *specialized scheme for liquidating embarrassed business enterprises*. (emphasis added)

Significantly, in *Moore*, this Court cited *Pennsylvania v. Williams* in support of this proposition.

Fostering and protecting principles of federalism is vital to our system of government. This Court has never suggested that it would require district courts to implement federalism principles by rote deference to a simplistic litmus test, with judges never lifting their eyes to see and consider the particulars of the actual cases before them. On the contrary, this Court has guided and guarded the delicate balance of "Our Federalism" through the application of *reasoned discretion*, not an insensible application of an arbitrary and inflexible rule based upon irrelevant historical distinctions.

C. The Abstention Doctrine Should Not Depend on an Out-Dated Law/Equity Distinction

The core question presented as to the abstention issue, which was decided by the Ninth Circuit and which is now before this Court, is whether the district courts must wear strait-jackets which preclude them from abstaining when the underlying action is "at law." The stark contrast between the Ninth Circuit's result in *Morgan Stanley*, 18 F.3d 790, and its result in the case below, with the latter result reached *solely* on the basis of the equity/law dichotomy, serves to highlight the unreasonable nature of such a mechanical rule.

In fact, at pages 19 and 20 of its Brief, among other places, Allstate makes clear its own objection to the use of "antique decisions" and "historical distinctions" that "produce arbitrary and anomalous results." Yet Allstate never refutes the fact that the mechanical imposition of the equity/law dichotomy in this case has produced an arbitrary and anomalous result.

Although Allstate now wishes to argue that the district court *should not have abstained*, it never presents a cogent argument to show why the rule should be that the district court *can never abstain* if the underlying case is "at law." The Commissioner proved to the satisfaction of the district court that it had sufficient grounds to warrant abstention and that court was persuaded that unless it abstained it would unduly interfere with the state court insolvency proceedings and the related regulatory scheme.

The question of whether the district court properly exercised its discretion, assuming it had any discretion to abstain in the instant case, is not before this Court. It is relevant to the Commissioner's argument, however, to show that, assuming *arguendo* that the underlying case is properly characterized as being "at law," there can be circumstances in which the principles of judicial federalism and comity serve to compel abstention and that the denial of abstention *solely* on the basis of the equity/law distinction creates an arbitrary and unreasonable result such as that condemned by this Court in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

D. Allstate's Assertion that the District Court Had No Jurisdiction to Abstain Because Allstate Sought No Injunctive Relief

This new argument, made at pages 30-35 of Allstate's Brief, misses the point. Allstate begins by saying that it "did not bring this lawsuit: the Liquidator did." Allstate's Brief, p. 30. This is correct, but only to a certain extent. It is true that the Commissioner ultimately sued to recover *his* assets and to obtain a declaratory judgment as to the parties' rights under California law as

applied to the reinsurance agreements and the insolvency statutes. But it is also true that Allstate had previously filed its offset claims in the receivership proceedings.

Not only did the Commissioner have the statutory duty to recover the assets of the insurer, which became the receiver's assets by operation of law and by court order, it is *only* the Commissioner, in his official capacity as receiver, who *can* recover them.¹⁴ Moreover, those assets although in the hands of Allstate, were part of the *res* of the receivership proceedings. If the Commissioner took no action, Allstate would end up in permanent possession of receivership assets in derogation of California's insolvency scheme, to the detriment of the policyholders and in violation of California's strong public policy.

Allstate asserts that the maintenance of this one action in federal court will not cause any harm because, among other things, Allstate will only "pursue such defenses as are just and well-founded." While the Commissioner is certainly gratified to have Allstate's assurance that it will only pursue winning defenses, the issue before this Court transcends any such assurances.

If the Ninth Circuit rule stands, it stands for all cases and all insurance insolvency proceedings. The effect of the Ninth Circuit rule is to permit insurers to file claims with receivership courts pursuant to state statutes, but then frustrate the state statutory scheme by removing what constitutes essentially the same claims to a federal court. Whether or not Allstate seeks injunctive relief, the result is a severe and impermissible interference with the state insurance insolvency process—an interference that principles of comity and judicial federalism forbid and that abstention doctrines were created to avoid. Also, Allstate clearly concedes the equitable powers of the federal court in the underlying action when it refers to the relief it is seeking as "either a stay of this litigation . . . or failing that setoff." Allstate's Brief, p. 30. A stay is equitable relief. So is a setoff. Allstate thus admits it is seeking

¹⁴ See Commissioner's Opening Brief, pp. 10-11, ¶¶ 10-11 nn.26-28.

equitable relief in a case it says is "at law." Yet Allstate then asserts that the relief it requests will not restrain an administrative agency on a matter of peculiarly local concern and therefore the district court had no equitable discretion to exercise. Under the authorities discussed above, this position is both inconsistent and untenable.¹⁵

California's interest in having an efficient and manageable insolvency process is solidly within its just and vital concern. When Allstate admits it seeks a stay of this process, it admits that it is seeking to interfere with it. The broad prohibition enunciated by the Ninth Circuit would not only permit the kinds of interference the Commissioner faces in the instant case, but would also seem to sanction damage or declaratory judgment actions filed directly in federal court which could not be subject to abstention no matter how much a district court were convinced such a suit interfered with the state court proceedings and the state's insolvency scheme.

E. The Need for a Consolidated Forum

As discussed above, Allstate's assertions that there is no need to have a single insolvency proceeding and to consolidate all actions there is untenable.¹⁶ In addition to

¹⁵ "Moreover, assigning this dispute to the California insurance insolvency court also furthers 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies.'" *Checker Motors Corp. v. Superior Court*, 13 Cal. App. 4th 1007, 1026, 17 Cal. Rptr. 2d 618, 626 (1993) (citing this Court's opinion in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). The *Checker* court added, "The entire 'Interstate judicial system' benefits when insurance company involvements and all the disputes they generate can be managed by a single court in a single jurisdiction. . . ." 13 Cal. App. 4th at 1019, 17 Cal. Rptr. 2d at 627.

¹⁶ Allstate attempts to make such of the fact that various orders of the Receivership Court also permit the receiver to pursue actions in other courts. These provisions were included to make it clear that the Commissioner could, in an appropriate case, choose to proceed in another court. For example, as Allstate points out, there are provisions for ancillary receiverships in other states which deal with assets in those states. Usually these are limited to certain

being stymied by *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, and the other authorities discussed above, Allstate's argument is also refuted by Cal. Ins. Code § 1058 which provides:

In any proceeding pending under the provisions of this article, the court in which such proceeding is pending shall have jurisdiction to hear and determine, in such proceeding, all actions or proceedings then pending or thereafter instituted by or against the [insolvent insurer].¹⁷

special and statutory deposits required by local law. These are not permitted to interfere with the proceedings in California. See, e.g., *Checker*, 13 Cal. App. 4th 1007, 17 Cal. Rptr. 2d 618, where an effort to use an ancillary proceeding to interfere with the jurisdiction of the California court was flatly rejected. Also, some of the Mission Companies' reinsurers are in *in rem* insolvency proceedings in other states. In appropriate circumstances, it is necessary for the Commissioner to become involved in those proceedings. Further, it might be necessary for the Commissioner to proceed with respect to real estate located in another state. In other instances, the Commissioner has found it necessary to enforce California judgments in foreign countries. There are many reasons why the Commissioner, in the exercise of his discretion might *choose* to go to another court in a limited circumstance. However, as to the core process of marshaling assets and adjudicating claims, the Commissioner needs a single consolidated court.

¹⁷ Allstate cites *Webster v. Superior Court*, 46 Cal. 3d 338, 343-53, 758 P.2d 596, 598-606 (1988) in support of its position that there is no authority for a stay of actions affecting the *res*. However, Allstate misstates the rule in that case. *Webster* was a personal injury case where the injured party sought to recover, not from the insolvent insured, but from its insurer (a third party). Rather than deciding the case as Allstate suggests, the California Supreme Court held that a stay is not mandated by the governing statutes when the claimant makes a binding election not to recover from the insolvent's assets. However, that Court held that if the claimant *does* seek to recover from the insolvent's assets, the action *may* be stayed. Here, Allstate has elected to file its claims seeking to impose a claim on the assets belonging to the Commissioner. Accordingly, *Webster* supports the Commissioner, not Allstate. Further, the California Supreme Court stated that Cal. Ins. Code § 1020 "reflects a legislative intent to preserve an insolvent insurer's assets for orderly disposition by the commissioner." 46 Cal. 3d at 344, 758 P.2d at 599.

Although the sense of the California insolvency statutes is that there will be a single consolidated proceeding in one court, this statute does not expressly provide that the Receivership Court shall have sole and exclusive jurisdiction over all actions and proceedings. However, California Ins. Code § 1020 does explicitly permit the Receivership Court to issue various injunctions and other court orders in order to protect its jurisdiction and the efficacy of the insolvency proceedings. Pursuant to this authority, the Receivership Court in this case, beginning almost 10 years ago, has issued a series of orders which assume sole and exclusive jurisdiction over the assets of the Mission Companies and the exclusive right to hear and determine in the insolvency proceedings all related actions. See Commissioner's Opening Brief, pp. 8-9 nn. 19, 20.¹⁸ Under *Underwriters Nat'l Assurance Co. v. North Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 703-10 (1982), those orders are entitled to respect.

CONCLUSION

For the foregoing reasons and those stated in the Commissioner's Opening Brief, the decision below should be reversed.

¹⁸ See *Morgan Stanley*, 18 F.3d at 791 where the Ninth Circuit makes the same point.

Respectfully submitted,

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Dated: January 31, 1996

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IN THE
Supreme Court of the United States

CLERK

OCTOBER TERM, 1995

**CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
LIQUIDATOR AND TRUSTEE OF THE MISSION INSUR-
ANCE COMPANY TRUST, MISSION NATIONAL INSUR-
ANCE COMPANY TRUST, ENTERPRISE INSURANCE
COMPANY TRUST, HOLLAND-AMERICA INSURANCE
COMPANY TRUST AND MISSION REINSURANCE COR-
PORATION TRUST,**

Petitioner,
v.

ALLSTATE INSURANCE COMPANY,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION,
NATIONAL LEAGUE OF CITIES,
U.S. CONFERENCE OF MAYORS,
AND NATIONAL GOVERNORS' ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Amici will address the following question:

Whether the abstention powers of federal courts are limited to actions in equity, or alternatively, whether the exercise of *Burford* abstention is limited solely to actions in equity.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT	3
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. THE FEDERAL COURTS' AUTHORITY TO ABSTAIN IS NOT LIMITED TO ACTIONS WHICH SEEK EQUITABLE RELIEF	7
A. <i>Burford</i> Abstention Is Not Limited To Actions Which Seek Solely Equitable Relief..	9
B. Limiting <i>Burford</i> Abstention To Equitable Actions Ill Serves The Doctrine's Vital Purposes	12
II. <i>BURFORD</i> ABSTENTION IS PROPER IN THIS CASE	19
CONCLUSION	25

TABLE OF AUTHORITIES

Cases	Page
<i>Alabama Pub. Serv. Comm'n v. Southern Ry. Co.</i> , 341 U.S. 341 (1951)	9, 12, 22, 25
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943)	<i>passim</i>
<i>Canada Malting Co. v. Paterson Steamships</i> , 285 U.S. 413 (1932)	15
<i>Clay v. Sun Ins. Office Ltd.</i> , 363 U.S. 207 (1960)	10, 11
<i>Colorado River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976)	17
<i>Fair Assessment in Real Estate Ass'n v. McNary</i> , 454 U.S. 100 (1981)	<i>passim</i>
<i>Fornaris v. Ridge Tool Co.</i> , 400 U.S. 41 (1970)	10
<i>Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.</i> , 613 F.2d 468 (2d Cir. 1980)	17
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501 (1947)	15
<i>Hawks v. Hamill</i> , 288 U.S. 52 (1933)	18
<i>In re Utility Oil Corp.</i> , 10 F. Supp. 678 (S.D.N.Y. 1934)	17-18
<i>Langnes v. Green</i> , 282 U.S. 531 (1931)	14
<i>Louisiana Power & Light Co. v. City of Thibodaux</i> , 360 U.S. 25 (1959)	<i>passim</i>
<i>McNeese v. Board of Education</i> , 373 U.S. 668 (1963)	17
<i>Midwest Mechanical Contractors, Inc. v. Common- wealth Constr. Co.</i> , 801 F.2d 748 (5th Cir. 1986)	17
<i>Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983)	20
<i>National Private Truck Council, Inc. v. Oklahoma Tax Comm'n</i> , 115 S.Ct. 2351 (1995)	18
<i>New Orleans Pub. Serv., Inc. v. Council of New Orleans</i> , 491 U.S. 350 (1989)	<i>passim</i>
<i>New York v. United States</i> , 112 S.Ct. 2408 (1992) ..	9
<i>Penn General Casualty Co. v. Pennsylvania</i> , 294 U.S. 189 (1935)	<i>passim</i>
<i>Pennsylvania v. Williams</i> , 294 U.S. 176 (1935)	4, 9, 24, 25
<i>Pennzoil Co. v. Texaco, Inc.</i> , 481 U.S. 1 (1987)	15
<i>Piper Aircraft Co. v. Reyno</i> , 454 U.S. 235 (1981) ..	15

TABLE OF AUTHORITIES—Continued

	Page
<i>Prudential Ins. Co. v. Benjamin</i> , 328 U.S. 408 (1946)	20
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984)	19
<i>Texas v. Donoghue</i> , 302 U.S. 284 (1937)	24
<i>Thompson v. Magnolia Petroleum Co.</i> , 309 U.S. 478 (1940)	23
<i>United Gas Pipe Line Co. v. Ideal Cement Co.</i> , 369 U.S. 134 (1962)	10
<i>United States Dept. of Treas. v. Fabe</i> , 113 S.Ct. 2202 (1993)	2, 20, 21
<i>Wolfson v. Mutual Benefit Life Ins. Co.</i> , 51 F.3d 141 (8th Cir. 1995)	13
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	5, 16, 16-17, 18
Statutes	
Cal. Ins. Code §§ 1010—1064.12	6, 8, 21
Cal. Ins. Code § 1011	21
Cal. Ins. Code § 1016	21
Cal. Ins. Code § 1020	21
Cal. Ins. Code § 1031	21
Cal. Ins. Code § 1033	21
Cal. Ins. Code § 1037	3
Federal Arbitration Act, 9 U.S.C. §§ 1-16	19
9 U.S.C. § 4	3
McCarran-Ferguson Act, 15 U.S.C. § 1012(b)	20
11 U.S.C. § 109(b) (2)	20-21
11 U.S.C. § 109(d)	20-21
28 U.S.C. § 1332	3
Other Authorities	
71 Am. Jur. 2d <i>Specific Performance</i> (1973)	18
Paul M. Bator et al., <i>Hart and Wechsler's The Fed- eral Courts and The Federal System</i> (3d ed. 1988)	11, 25
John D. Butzner, Jr. & Mary Nash Kelly, <i>Certifica- tion: Assuring the Primacy of State Law in the Fourth Circuit</i> , 42 Wash. & Lee L. Rev. 449 (1985)	11
81 C.J.S. <i>Specific Performance</i> (1977)	18

TABLE OF AUTHORITIES—Continued

	Page
Kathleen Heald Ettlinger <i>et al.</i> , <i>State Insurance Regulation</i> (1995)	2, 8
The Federalist No. 45 (James Madison) (Isaac Kramnick ed. 1987)	9
David L. Shapiro, <i>Jurisdiction and Discretion</i> , 60 N.Y.U. L. Rev. 543 (1985)	7, 13, 15, 16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-244

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
 THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
 LIQUIDATOR AND TRUSTEE OF THE MISSION INSUR-
 ANCE COMPANY TRUST, MISSION NATIONAL INSUR-
 ANCE COMPANY TRUST, ENTERPRISE INSURANCE
 COMPANY TRUST, HOLLAND-AMERICA INSURANCE
 COMPANY TRUST AND MISSION REINSURANCE COR-
 PORATION TRUST,

v. *Petitioner,*

ALLSTATE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the
 United States Court of Appeals
 for the Ninth Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
 NATIONAL CONFERENCE OF STATE LEGISLATURES,
 NATIONAL ASSOCIATION OF COUNTIES,
 INTERNATIONAL CITY/COUNTY
 MANAGEMENT ASSOCIATION,
 NATIONAL LEAGUE OF CITIES,
 U.S. CONFERENCE OF MAYORS,
 AND NATIONAL GOVERNORS' ASSOCIATION
 AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state,
 county, and municipal governments and officials
 throughout the United States, have a compelling in-

terest in legal issues that affect state and local governments. This case involves an issue at the core of *amici*'s interest: whether the discretion of a federal court to abstain in a case challenging state regulatory authority is limited to suits in equity.

Congress has granted the States broad authority to regulate the business of insurance. *See United States Dept. of Treas. v. Fabe*, 113 S.Ct. 2202, 2207 (1993). Pursuant to this authority, the States have enacted comprehensive and complex regulatory schemes including procedural and substantive provisions governing the liquidation of insolvent insurers. A liquidation "can involve billions in assets, hundreds of products, and thousands of policyholders spread over the world," Kathleen Heald Ettlinger *et al.*, *State Insurance Regulation* 221 (1995), as well as hundreds of reinsurance agreements with entities located throughout the world. State liquidation schemes generally designate the state insurance commissioner as liquidator and require all creditors (whether policyholders, reinsurers, or general creditors) to file any claims in the state receivership court and authorize the court to enjoin the prosecution of all other actions. The exercise of federal court jurisdiction thus has great potential to disrupt the orderly conduct of state liquidation proceedings and delay the final distribution of the estate.

Because of the importance of the issues raised in this case for both abstention doctrine generally and the conduct of insurer liquidation proceedings, *amici* submit this brief to assist the Court in its resolution of the case.¹

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

This case arises out of the California Insurance Commissioner's nearly decade-long effort to liquidate the Mission Group of insurance companies. The Mission Group insolvency is one of the largest in U.S. history, involving hundreds of thousands of policy holders in all 50 States and hundreds of reinsurance agreements made with entities located throughout the United States and in more than two dozen foreign countries. Pet. 2. More than 180,000 claims have been filed in the liquidation proceedings by policyholders, third party claimants, reinsurers, and state guaranty associations seeking billions of dollars. *Id.* at 7.

Pursuant to the statutory duty to collect the debts due the various Mission companies' estates, *see* Cal. Ins. Code § 1037, the Commissioner brought this action in California Superior Court (the duly appointed receivership court) against respondent Allstate Insurance Company to recover sums owed under various reinsurance agreements to the Mission Insurance Company, one of the entities in liquidation. Pet. App. 14a-15a. Allstate invoked diversity jurisdiction, *see* 28 U.S.C. § 1332, to remove the action to federal district court. Pet. App. 15a.

Once in federal district court, Allstate moved under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, to compel the specific performance of arbitration clauses contained in the various reinsurance agreements. Pet. App. 15a. The district court put the motion off calendar and instead heard and granted the Commissioner's motion to abstain under the principles of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Pet. App. 23a-24a. Allstate appealed. *Id.* at 4a.

The court of appeals reversed. Notwithstanding that Allstate had sought as relief the specific performance of the arbitration clauses contained in the various reinsurance agreements, the court characterized the case as one "in which no equitable relief is sought." Pet. App. 2a. While the court of appeals acknowledged that this Court has "explicitly expanded some forms of abstention to a few 'special' classes of damages actions," it reasoned that the authority of federal courts to abstain "is founded upon a discretion they possess only in equitable cases." *Id.* at 11a. It further reasoned that this Court's decision in *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) (*NOPSI*), "gave strong indication that the power to abstain under *Burford* should not apply in suits at law." Pet. App. 12a. The court of appeals thus reversed the district court's abstention order and remanded the case for further proceedings. *Id.*

SUMMARY OF ARGUMENT

1. *Burford* abstention is not limited to actions which seek solely legal relief. The Court has long held that in deciding whether to exercise their statutorily granted jurisdiction, the federal courts must give "proper regard for the rightful independence of state governments in carrying out their domestic policy." *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935). Thus, while most of the Court's decisions upholding abstention have been premised on the traditional discretion exercised by courts of equity in deciding whether to grant relief, the Court has recognized that a federal court's authority to abstain is not rooted merely in the "technical rule[s] of equity procedure [but] reflect[s] a deeper policy derived from our federalism." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959).

The Court has thus instructed that in deciding whether to abstain, lower federal courts must consider such factors as the complexity of state law issues, the potential for disruption of the State's system of policy and review, and whether the State has provided an adequate forum. See *Burford*, 319 U.S. at 331-34. The Court has further recognized that even an action at law can be so disruptive of state autonomy as to warrant abstention. See *Thibodaux*, 360 U.S. at 28-30; *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 113-17 (1981).

Contrary to the reasoning of the court of appeals, this Court's decision in *NOPSI* does not foreclose abstention in an action at law. *NOPSI* did not involve an action at law and simply did not consider the question. Moreover, the *NOPSI* Court's discussion of the state regulatory body's assertions that abstention was appropriate under either *Burford* or *Younger v. Harris*, 401 U.S. 37 (1971), reaffirms that there is no *per se* rule prohibiting abstention in actions at law. As the *NOPSI* Court noted, *Younger* abstention "was based partly on traditional principles of equity but rested primarily on the 'even more vital consideration' of comity." 491 U.S. at 364 (quoting 401 U.S. at 43-44). And in discussing the state agency's *Burford* claim, the Court reiterated that abstention is appropriate "when there are 'difficult questions of state law bearing on policy problems of substantial public import' " or when " 'federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " 491 U.S. at 361 (citation omitted).

2. Weighing the relevant state and federal interests at issue here demonstrates why the district

court's abstention order should be reinstated. Allstate's asserted right to compel arbitration of its dispute can be raised in the state court proceedings. Allstate has made no showing that the California courts are inadequate for the protection of its right.

In contrast, California has a substantial interest in conducting the Mission liquidations in state court free from federal interference. California has exercised its authority under the McCarran-Ferguson Act to enact a comprehensive scheme regulating the "business of insurance" and has adopted complex provisions governing the liquidation of insolvent insurers and the rights and liabilities of various classes of creditors. *See* Cal. Ins. Code §§ 1010—1064.12. The State has also appointed a receivership court which has exercised its authority to enjoin interference with the various liquidation proceedings.

The court of appeals, however, gave no consideration to the State's substantial interest in having issues arising in the liquidation proceedings be resolved by the receivership court. Nor did it consider whether the state liquidation proceedings provided Allstate with an adequate forum. And most significantly, the court of appeals did not consider the complexity of the state law issues and the frustration of the State's policy which could potentially result from federal court intervention.

The Court, however, has long recognized a policy of federal court non-intervention in state insurer liquidation proceedings. *See Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 197-99 (1935). And it has not required the presence of an unclear issue of state law in ordering abstention in such cases. *See id.* But if the "proper regard for the right-

ful independence of state governments in carrying out their domestic policy," *Williams*, 294 U.S. at 185, requires abstention in such cases even when there are no unclear issues of state law, it must surely do so here where issues of great importance to the State's policy remain unsettled.

ARGUMENT

I. THE FEDERAL COURTS' AUTHORITY TO ABSTAIN IS NOT LIMITED TO ACTIONS WHICH SEEK EQUITABLE RELIEF

This Court has long recognized that the statutes conferring jurisdiction on the federal courts must be read against the common law background of exercising a principled discretion in deciding whether to hear a particular case. *See NOPSI*, 491 U.S. at 359 (citing David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 570-77 (1985)); *Thibodaux*, 360 U.S. at 30; *Burford*, 319 U.S. at 317-18. Thus, while the Court has characterized the obligation of federal courts to hear a case within their jurisdiction as "‘virtually unflagging,’" and said that abstention is "‘the exception, not the rule,’" *NOPSI*, 491 U.S. at 359 (citations omitted), it has recognized that there are some cases in which the interests of federalism and comity require the federal courts to decline to exercise their jurisdiction. *See Shapiro, Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. at 551.

The court of appeals, however, gave no consideration to California's substantial interest in conducting the Mission liquidations in a unified proceeding in its own courts. Instead, the court relied solely on the formalistic notion that abstention is appropriate

only when a federal court is called upon to exercise its equitable powers. But as explained below, the purpose of the *Burford* doctrine—the prevention of undue interference with state policy—would be ill served by a rule limiting its application to suits in equity, for under some circumstances an action for damages can disrupt state policy to the same degree as a suit for an injunction. The Court has long recognized as much and thus, contrary to the view of the court of appeals, has not imposed such a rigid limitation on the federal courts' authority to abstain. Rather, even in actions at law the Court has engaged in a careful examination of the relevant state and federal interests and ordered abstention when damages actions would unduly disrupt a State's well organized system of regulation and review. See *Fair Assessment*, 454 U.S. at 113-16.

This is such a case. As explained below, the regulation of insurance insolvency is a matter of exclusive state interest. See 11 U.S.C. § 109(b)(2) & (d) (excluding insurance companies from the coverage of the federal bankruptcy code); Ettlinger, *State Insurance Regulation* at 210. The statutory schemes governing the liquidation of a failed insurer involve complex procedural and substantive provisions, see Ettlinger, *State Insurance Regulation* at 220-21; Cal. Ins. Code §§ 1010-1064.12, and can, as here, involve difficult and unsettled issues of state law which should be decided in the first instance by the state courts. The federal courts should therefore abstain under the principles articulated in *Burford* and *Thibodaux*.

A. *Burford* Abstention Is Not Limited To Actions Which Seek Solely Equitable Relief

Our constitutional system is founded on the recognition that the States possess sovereign authority over "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people." The Federalist No. 45, at 296 (James Madison) (Isaac Kramnick ed. 1987). Even today, in an era in which "interstate commerce has become ubiquitous" and "activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power," *New York v. United States*, 112 S. Ct. 2408, 2419 (1992), the States continue to exercise substantial regulatory authority over numerous activities.

The Court has thus long recognized that in deciding whether to exercise their statutorily granted jurisdiction, the federal courts must give "proper regard for the rightful independence of state governments in carrying out their domestic policy." *Pennsylvania v. Williams*, 294 U.S. at 185; *Burford*, 319 U.S. at 318. To be sure, many of the Court's cases upholding abstention have been premised on the historic discretion exercised by courts of equity in deciding whether to grant or deny relief. See, e.g., *Burford*, 319 U.S. at 332-34. The Court, however, has made clear that a federal court's authority to abstain is not rooted in the "technical rule[s] of equity procedure [but] reflect[s] a deeper policy derived from our federalism." *Thibodaux*, 360 U.S. at 28; see also *NOPSI*, 491 U.S. at 364; *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 349-50 (1951).

These federalism interests are especially significant where, as here, a federal court is called upon to interpret the provisions of a complex state regulatory scheme. See, e.g., *Burford*, 319 U.S. at 327-28; cf. *Thibodaux*, 360 U.S. at 30. As the Court has observed, in such situations "the federal courts can make [but] small contribution to [a State's] well organized system of regulation and review [d]elay, misunderstanding of local law, and needless federal conflict with the State policy, are the inevitable product of this double system of review." *Burford*, 319 U.S. at 327. As the Court further observed in *Thibodaux*, a federal court should "ascertain the meaning of a disputed state statute from the only tribunal empowered to speak definitively—the courts of the State . . . rather than . . . make a dubious and tentative forecast." 360 U.S. at 29.

The Court's admonitions are founded on the recognition that, under our constitutional system, a federal court does not speak as the ultimate interpreter of a State's statutory scheme. See *Thibodaux*, 360 U.S. at 29-30.² An erroneous determination by the federal courts on an important issue of statutory

² See also *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42-44 (1970) (per curiam) (instructing lower federal courts to abstain in damages action brought under diversity jurisdiction until the Puerto Rico Supreme Court interpreted unclear provision of commonwealth's law); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135 (1962) (per curiam) (vacating judgment of court of appeals in damages action brought under diversity jurisdiction on ground that controlling state law issue should be decided by the state courts); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960) (vacating judgment of court of appeals in damages action brought under diversity jurisdiction on ground that state courts might interpret state law to avoid constitutional question).

construction can have a profound effect on a State's policy and result in the reordering of the balance struck in the State's legislative and regulatory processes. Moreover, under our federal system such a determination cannot be appealed to the State's supreme court.³ While such a decision presumably would be the law of the case as between the parties involved, state courts are not required to give precedential effect to an erroneous federal court interpretation of state law. See *Thibodaux*, 360 U.S. at 30. And while a subsequent state court decision might eventually make clear to federal courts the proper meaning of a state statute, the frustration of the State's policy caused by the erroneous construction will already have been done.⁴

³ *Amici* acknowledge that the Court has, in some instances, directed the lower federal courts to certify questions of state law to the state supreme court. See, e.g., *Clay*, 363 U.S. at 212. Certification, however, is discretionary and utilized rarely. See John D. Butzner, Jr. & Mary Nash Kelly, *Certification: Assuring the Primacy of State Law in the Fourth Circuit*, 42 Wash. & Lee L. Rev. 449, 455 (1985) (estimating that out of 23,000 cases filed in Fourth Circuit, the procedure was used less than six times). See also Paul M. Bator et al., *Hart and Wechsler's The Federal Courts And The Federal System* 1382 (3d ed. 1988) (noting "the danger that the certified question will be badly drafted, too abstract, or misunderstood by the state court, or that the federal court will be unsure of the significance of the answer"). While certification may be adequate in some circumstances, it is inappropriate in cases challenging complex regulatory schemes.

⁴ *Burford* demonstrates that these concerns are not merely theoretical. As the Court explained:

The most striking example of misunderstanding has come where the federal court has flatly disagreed with the position later taken by a State court as to State law. In those cases, the federal court attributed a given meaning to the state statute which went to the heart of the

B. Limiting *Burford* Abstention To Actions Which Seek Solely Equitable Relief Ill Serves The Doctrine's Vital Purposes

The Court's cases thus make clear that the principles of federalism and comity require that the lower federal courts, in deciding whether to abstain, consider such factors as the complexity of the state law issues, the potential for disruption of the State's system of policy and review, and whether the State has provided an adequate forum. *See, e.g., Burford*, 319 U.S. at 333-34; *Alabama Pub. Serv. Comm'n*, 341 U.S. at 349-50. The vital federalism concerns that underlie *Burford* abstention can be equally as pressing solely legal relief." *Id.* at 8a. In the court of appeals that seek a mixture of legal and equitable relief.

The court of appeals, however, gave no consideration to the purposes underlying *Burford* abstention or whether the state forum was inadequate. *See* Pet. App. 8a-12a. Instead the court categorically held that "*Burford* abstention does not apply to suits seeking solely legal relief." *Id.* at 8a. In the court of appeals' view, the abstention orders in *Burford* and *Alabama Pub. Serv. Comm'n* were premised solely on the historic discretion of courts of equity to refuse

control program. The [Texas] Court of Civil Appeals disagreed, but before ultimate review could be had either in Texas or here, the legislature amended its statutes so that the cases became moot. Had the Texas Civil Appeals decision come first, it would have been unnecessary to make the changes which were made in an effort to stay within the limit thought by the Governor of Texas to have been set by the tone of the federal court's opinion. The Texas legislature later changed the law back to its original state, as clear an example of wasted motion as can be imagined.

319 U.S. at 327-28 (citations and footnotes omitted).

to grant relief. *Id.* at 9a-10a. And according to the court, "*NOPSI* suggests a renewed recognition that the power of federal courts to abstain from exercising their jurisdiction, at least in *Burford* abstention cases, is founded upon a discretion they possess only in equitable cases." *Id.* at 11a.

To be sure, many of the Court's abstention cases have rested on the traditional discretion which courts of equity exercise in deciding whether to grant or deny relief. But as the Court has made clear in numerous cases, abstention doctrine is not limited to suits seeking equitable relief but applies as well to actions at law which would unduly intrude on state sovereignty. *See Thibodaux*, 360 U.S. at 28-30; *see also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). As the Court explained in *Thibodaux*, "[t]hese prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism." 360 U.S. at 28. And a leading authority observes:

Many of these abstention cases involved claims for equitable relief, and in some instances the Supreme Court has invoked traditional equity principles to justify the decision not to proceed. But the cases have not been confined to actions in equity, and it is hard to see why they should be. The form of relief sought may have some bearing on the reasons for not proceeding, but it is certainly not the sine qua non of a decision to abstain. . . . To confine this form of discretion to equitable actions makes little sense, especially in a merged system.

Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. at 551-52; *see also Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 147 (8th Cir. 1995).

Thus, in *Thibodaux* the Court upheld a district court's order staying federal jurisdiction over an eminent domain proceeding, notwithstanding that the action was at law, because of an unclear issue of state law and "[t]he special and peculiar nature" of the proceeding. *Id.* at 28. As the Court further observed, "[t]he considerations that prevailed in conventional equity suits for avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court." *Id.*

And in *Fair Assessment* the Court upheld the dismissal of a taxpayers' suit for damages brought in federal court under section 1983. In so holding the Court noted "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." 454 U.S. at 102. The Court further recognized that even though the taxpayers were seeking only monetary relief, the federal court's award of that relief would be tantamount to a declaratory judgment and "would be fully as intrusive as the equitable actions that are barred by principles of comity." *See* 454 U.S. at 113. Notwithstanding that the taxpayers' claims were premised on asserted violations of their federal rights, the Court consigned them to the state forum. *Id.* at 116. *Cf. Langnes v. Green*, 282 U.S. 531, 540-44 (1931) (ordering federal admiralty court to abstain to allow plaintiff to proceed with suit in state court).⁵

⁵ The court of appeals' view that abstention "is founded upon a discretion [federal courts] possess only in equitable cases," *Pet. App.* 11a, is also irreconcilable with the doctrine

Thus, contrary to the view of the court of appeals, this Court has never held that a federal court's authority to abstain is limited to cases seeking equitable relief. Instead the Court has taken a pragmatic approach recognizing that damages actions can be just as disruptive of state sovereignty as suits in equity and that "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases." *NOPSI*, 491 U.S. at 359 (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987)). The Court has accordingly engaged in a careful examination of the relevant state and federal interests when called upon to review whether the

of *forum non conveniens*, under which actions at law have been routinely dismissed on the ground that the exercise of federal court jurisdiction would be inappropriate. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257-61 (1981) (upholding federal district court's dismissal of damages action brought under diversity jurisdiction on ground that the suit should be tried in foreign forum); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 512 (1947) (upholding federal district court's authority to dismiss damages action brought under diversity jurisdiction on ground that suit should be heard in another State); *Canada Malting Co. v. Paterson Steamships*, 285 U.S. 413, 417, 423-24 (1932) (affirming federal admiralty court's discretion to dismiss damages action within its jurisdiction on grounds that case should be heard in foreign forum). *See generally* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. at 555-57.

If the doctrine of *forum non conveniens* permits a federal court to dismiss a damages action, it is difficult to understand why its close relation of abstention, should be limited to suits in equity, particularly given the role the States play in our constitutional system. *See Gulf Oil*, 330 U.S. at 505 ("On substantially *forum non conveniens* grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state.").

lower federal courts should abstain in a particular case. See Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. at 582-83.

Nor is there any merit to the court of appeals' view that *NOPSI* changed this. *NOPSI* did not involve a claim for damages but rather claims for the equitable remedies of injunctive and declaratory relief. See 491 U.S. at 353. It is thus implausible to suggest, as the Ninth Circuit did, that the Court was overruling the pragmatic approach of cases such as *Fair Assessment* and *Thibodaux*, which make clear that the nature of the relief sought is not the *sine qua non* of abstention. *NOPSI* simply did not consider the question.

Moreover, *NOPSI*'s discussion of the state regulatory body's assertion that abstention was appropriate under either *Burford* or *Younger v. Harris*, 401 U.S. 37 (1971), indicates that the Court was not overruling such cases as *Fair Assessment* and *Thibodaux* to hold that abstention is always inappropriate in cases seeking legal relief. See generally 491 U.S. at 360-73. To the contrary, the Court's discussion of the *Younger* doctrine noted that the holding "was based partly on traditional principles of equity but rested primarily on the 'even more vital consideration' of comity." 491 U.S. at 364 (quoting *Younger*, 401 U.S. at 44) (internal citation omitted). The Court further explained:

this includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to

perform their separate functions in their separate ways."

Id. (quoting *Younger*, 401 U.S. at 44).

Similarly, the *NOPSI* Court's rejection of the state agency's *Burford* claim reiterated that *Burford* abstention is appropriate "when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or . . . where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" 491 U.S. at 361 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). In *NOPSI* there was simply no "state-law claim" at issue, "nor even an assertion that the federal claims are 'in any way entangled in a skein of state-law that must be untangled before the federal case [could] proceed.'" *Id.* at 361 (quoting *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963)).⁶

⁶ The Commissioner has framed the second question in the petition based on the court of appeals' characterization of this case as one "in which no equitable relief is sought." See Pet. App. 2a. But the relief Allstate seeks in federal court—an order compelling arbitration—is not properly characterized as legal in nature. As several courts of appeals have noted, a motion to compel arbitration "is a request that the court compel specific performance of an agreement to arbitrate." *Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co.*, 801 F.2d 748, 750 (5th Cir. 1986); see also *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 472 (2d Cir. 1980). As such, Allstate's claim is equitable in nature, see *Guinness-Harp*, 613 F.2d at 473, and is governed by the rules applied by courts of equity in suits for specific performance. See *In re Utility Oil Corp.*, 10

As the foregoing demonstrates, a federal court's authority to abstain is not limited to those cases which seek solely equitable relief. Indeed, given our

F. Supp. 678, 680 (S.D.N.Y. 1934); cf. 81 C.J.S. *Specific Performance* § 6, at 705 (1977) ("The granting of specific performance is governed by the elements, conditions, and incidents which control the administration of all equitable remedies, and specific performance will be ordered only on equitable grounds in view of all the conditions surrounding the particular case.") (footnote omitted). See also 71 Am. Jur. 2d *Specific Performance* § 4, at 13 (1973).

One of the fundamental principles of federal equity jurisprudence is that a federal court must exercise its equitable jurisdiction with due regard for the rightful independence of state governments. See *Burford*, 319 U.S. at 317-18; *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 197 (1935). As the Court stated in *Burford*:

Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion . . . "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest," for it "is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."

319 U.S. at 317-18 (footnote and citations omitted); see also *Hawks v. Hamill*, 288 U.S. 52, 60-61 (1933). Cf. *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S.Ct. 2351, 2354-57 (1995) (discussing policy of federal non-interference with state tax administration); *Younger v. Harris*, 401 U.S. 37, 43-45 (1971) (discussing policy of federal non-interference with state court proceedings).

While in deciding whether to abstain a federal court must also consider whether the State has provided an adequate forum, see, e.g., *Burford*, 319 U.S. at 334, where, as here, there has been no credible showing that the state liquidation proceeding is inadequate for the protection of Allstate's rights, the federal courts should abstain in favor of it. See *Penn Gen. Casualty*, 294 U.S. at 197.

merged system of law and equity such a rule is incompatible with the purposes of the *Burford* doctrine. It is likewise incompatible with the Court's recognition that even an action for damages can unduly disrupt state autonomy so as to warrant abstention. Of course, suits seeking equitable relief are more frequently strong candidates for abstention than those which seek only damages. Nonetheless, the Court has long made clear that the nature of the relief sought is only one of several factors that a federal court must consider in determining whether to abstain.

II. *BURFORD* ABSTENTION IS PROPER IN THIS CASE

The court of appeals thus erred in failing to take into consideration the relevant state and federal interests at issue here. An examination of these interests demonstrates that the federal interest invoked by Allstate is too insubstantial to defeat California's strong interest in resolving in its own courts the issues raised by Allstate's assertion of the right to setoff. The district court's abstention order should therefore be reinstated.

Allstate invokes the jurisdiction of the federal courts to compel the arbitration of its dispute with the State under the Federal Arbitration Act, 9 U.S.C. §§ 1-16. See Br. Opp. at 19. But even if there is any issue in this dispute which is subject to arbitration, the right to seek an order compelling arbitration is enforceable in California's courts. See *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984). That Congress, in enacting the Federal Arbitration Act, did not deem it necessary to "create any independent federal-question jurisdiction" to hear a suit to compel

arbitration, *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983), demonstrates that a federal forum is not essential to the vindication of the federal interest at issue here.

In contrast, California's interest in conducting the Mission liquidations and resolving this dispute in its own courts is substantial. Congress has granted the States broad authority under the McCarran-Ferguson Act to regulate the "business of insurance" from creation to dissolution. 15 U.S.C. § 1012(b); see also *Fabe*, 113 S.Ct. at 2204.⁷ Consistent with the Congressional judgment that insurer liquidation proceedings are a matter of exclusive state interest, federal bankruptcy law specifically excludes insurers from the entities which are subject to it. See 11 U.S.C. § 109(b) (2) & (d).⁸

⁷ The Court has observed that "'Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Fabe*, 113 S.Ct. at 2207 (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946)). The Court has further observed that the McCarran-Ferguson Act "'declar[es] expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.'" *Id.* (quoting *Benjamin*, 328 U.S. at 430).

⁸ In the related area of state taxation, the Court has relied on the policies underlying the Tax Injunction Act to prohibit taxpayers from bringing damages actions in the federal courts, notwithstanding the Act's textual focus on equitable remedies. See *Fair Assessment*, 454 U.S. at 109-10. Here, the McCarran-Ferguson Act's re-affirmation of state authority to regulate insurance, see 15 U.S.C. § 1012(b), and the Federal Bankruptcy Code's specific exclusion of insurance companies from the entities subject to it, see 11 U.S.C.

California, like all States, has relied on the broad authority granted it in the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), to enact "a complex and specialized administrative structure for the regulation of insurance companies from inception to dissolution." *Fabe*, 113 S.Ct. at 2204; see generally Cal. Ins. Code. As part of this regulatory structure, California has established a comprehensive and intricate scheme for liquidating insolvent insurers, see *id.* §§ 1010-1064.12, which includes, most significantly, provisions establishing the priority in which claims on the insurer's estate are to be paid, see *id.* § 1033, and the circumstances in which creditors can assert setoffs. See *id.* § 1031.

Demonstrative of the State's substantial interest in conducting the Mission liquidations free from federal interference, California law provides for the appointment of a receivership court and vests title to all of the insurer's assets in the State for disposition in the liquidation. See *id.* §§ 1011, 1016. Furthermore, state law authorizes the receivership court to enjoin "[i]nterference with the commissioner or the proceeding," "[t]he institution or prosecution of any actions or proceedings," and "[t]he obtaining of preferences, judgments, attachments, or other liens against [the insolvent insurer] or its assets," *id.* § 1020, a power which was exercised here. See Pet. App. 119a-21a (Order Appointing Liquidator And Restraining Order).

§ 109(b) (2) & (d), provide a similar manifestation of the strong federal policy against federal court interference with insurer liquidation proceedings so long as those proceedings adequately protect a claimant's rights.

The court of appeals, however, gave no consideration to the State's substantial interest in having issues arising in the course of the liquidation proceedings be resolved by the receivership court (which through the course of the lengthy conservation and liquidation proceedings has acquired unique expertise in the statutory scheme) subject to review by the State's intermediate appellate and supreme courts. *Cf. Burford*, 319 U.S. at 327 ("[c]oncentration of judicial supervision of [agency] orders permits the state courts, like the [agency] itself, to acquire a specialized knowledge which is useful in shaping the policy of regulation"). Nor did the court of appeals consider whether the state liquidation proceedings failed to provide Allstate with an adequate forum. *See Alabama Pub. Serv. Comm'n*, 341 U.S. at 349 ("As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights.") (footnote omitted).

But most significantly, the court of appeals did not consider the complexity of the state law issues and the potential for frustration of the State's policy caused by the federal court's intervention. Indeed, the harm caused by the frustration of the State's policy would be especially significant in this case.

The state law issues implicated in this dispute include, *inter alia*, whether Allstate is entitled to set off reinsurance recoverables owed to its NESCO subsidiary by the Mission Insurance Company and in which, if any, of the five Mission liquidation estates the setoff can be asserted. These issues are complex and go to the core of California's policy. *See* Pet. Br. 5-6, Pet. App. 8a-9a. As the district court explained:

If Allstate prevails on its set-off defense, it could deduct the set-off figure directly from the total amount it owes to the Mission companies under the reinsurance agreements. If Allstate's set-off claims are unsuccessful, then it would pay all amounts owed to Mission up front, and Allstate's set-off claims would be treated like any other Class 6 creditor claim against the Mission assets. Practically speaking, then, resolution of this issue will dramatically impact on who ultimately receives the Mission assets.

Pet. App. 15a. Whatever the correct resolution of this state law issue, the risk of getting it wrong is substantial enough to warrant abstention on the part of the federal courts.⁹

This Court has recognized that notwithstanding the existence of jurisdiction, federal courts should not interfere with state insurer liquidation proceedings. *See Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 197-99 (1935). In *Penn General Casualty*, a shareholder of an insurer had invoked diversity jurisdiction to bring suit in federal court seeking the appointment of a receiver and the liquidation of the

⁹ In the analogous area of bankruptcy, a federal court exercises "exclusive and nondelegable control over the administration of an estate in its possession." *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940). The Court has nonetheless instructed federal bankruptcy courts to submit to state courts "particular controversies involving unsettled questions of State property law . . . arising in the course of bankruptcy administration." *Id.*; *see also id.* at 484 ("Unless the matter is referred to the State courts, upon subsequent decision by the [State Supreme Court] it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme.").

company. *Id.* at 191-92. Three weeks later, the state insurance commissioner initiated proceedings in state court to liquidate the company. *Id.* at 192. Notwithstanding that the federal court suit had been brought first and that the federal court had acquired jurisdiction over the assets of the insolvent insurer and had authority to proceed on the claim, the Court observed:

Although the District Court has thus acquired jurisdiction, the end sought by the litigation in the state court is the liquidation of a domestic insurance company by a state officer. In the absence of a showing that the interests of creditors and shareholders would not be adequately protected by this procedure, the case was a proper one for the District Court, in the exercise of judicial discretion, to relinquish the jurisdiction in favor of the administration by the state officer.

Id. at 197. *Cf. Pennsylvania v. Williams*, 294 U.S. 176, 183 (1935) (liquidation of bank under state regulation; Court holding that "the discretion of the District Court, invoked by the petition of the commonwealth, should have been exercised to relinquish the [federal court's] jurisdiction in favor of the statutory administration of the corporate assets by the state officer").¹⁰

¹⁰ To similar effect is *Texas v. Donoghue*, 302 U.S. 284 (1937), which involved a bankrupt oil company. The Court held that the federal bankruptcy court abused its discretion when it denied Texas leave to proceed with a suit seeking forfeiture of oil produced by the company which was brought in state court for violation of the State's conservation laws. See 302 U.S. at 286-89. As the Court recognized, "[f]orfeiture of unlawful oil under Texas law is a penalty imposed to vindicate the State's policy of conservation." *Id.* at 288.

Of further significance, in neither *Penn General Casualty* or *Williams* was the Court's instruction to the lower federal courts premised on the need to abstain because of an unclear issue of state law. See generally *Penn General Casualty*, 294 U.S. at 197; *Williams*, 294 U.S. at 184-86; *cf. Alabama Pub. Serv. Comm'n*, 341 U.S. at 346-50 (ordering abstention notwithstanding the absence of unclear state law issues on grounds "that regulation of intrastate railroad service [was] primarily" a state concern and State had provided an adequate system of review) (internal quotation and citation omitted); *Hart & Weschler* at 1365. But if the "proper regard for the rightful independence of state governments in carrying out their domestic policy," *Williams*, 294 U.S. at 185, required abstention even in the absence of any unclear issues of state law, it must surely do so here, where issues of great importance to the State's policy remain unsettled.

CONCLUSION

The judgment of the court of appeals should be reversed.

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November 30, 1995

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

CHUCK QUACKENBUSH, Insurance Commissioner of the State of California, in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, Enterprise Insurance Company Trust, Holland-America Insurance Company Trust and Mission Reinsurance Corporation Trust,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF OF THE COMMONWEALTH OF
MASSACHUSETTS AND THE DIRECTOR OF
INSURANCE OF THE STATE OF MISSOURI AS
AMICI CURIAE IN SUPPORT OF
PETITIONER, CHUCK QUACKENBUSH,
INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA**

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TABLE OF CONTENTS

	Page
Interest of <i>Amici Curiae</i>	1
Summary of Argument	5
Argument	7
A. Abstention is a balancing process calling for a weighing of State and Federal interests, not a mechanical test based on the form of action.	7
B. The State interest in a comprehensive receivership proceeding outweighs the Federal interest in providing a federal forum	8
C. The equity/law distinction should have no role in the District Court's decision whether to abstain	21
Conclusion	27

TABLE OF AUTHORITIES

	Page(s)
Cases:	
Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 103 S.Ct. 3200, 77 L.Ed.2d 837 (1983).	22
Attorney General v. North American Life Insurance Co., 82 N.Y. 172 (1880)	11
Burford v. Sun Oil Co., 319 U.S. 315 (1943).	5,21,22
Clay v. Sun Insurance Office, Ltd., 363 U.S. 207, 80 S.Ct. 1222 (1960).	24
Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).	21,22
Commissioner of Insurance v. Century Fire & Marine Insurance Co., 373 Mass. 473, 476-77, 367 N.E.2d 842 (1977)	2
Commonwealth of Pennsylvania v. Williams, 294 U.S. 176 (1935).	25
Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).	24
Doughty v. Underwriters at Lloyds, London, 6 F.3d 856 (1st Cir. 1993).	4,18
Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100, (1981).	24
Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970).	24
Garamendi v. Allstate Insurance Co., 47 F.3d 350 (9th Cir. 1995).	4,5,19,23

Garamendi v. Executive Life Ins. Co., 21 Cal. Rptr. 2d 578 (Cal. App. 1993), <i>review denied</i> 1993 Cal. LEXIS 5639 (1993)	13
General Glass Industries Corp. v. Monsour Medical Foundation, 973 F.2d 197 (3d Cir. 1992).	24
Grove v. Emison, ___ U.S. ___, 113 S.Ct. 1075 (1993).	7,22
Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).	25,26
Harrison County Commissioners Court v. Moore, 420 U.S. 77, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975).	22
In re Rehabilitation of Mutual Benefit Life Insurance Co., 609 A.2d 768 (N.J. App. Div. 1992)	13
Juidice v. Vail, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977).	23
Klaber v. O'Malley, 90 S.W.2d 396 (Mo. 1936).	3
Kuecklehan v. Federal Old Line Insurance Co., 69 Wash.2d 392, 418 P.2d 443 (1966).	11
Lake Carriers Ass'n v. MacMullan, 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972).	24
Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S.Ct. 1070 (1959)	24
Lucas v. Manufacturing Lumbermen's Underwriters, 163 S.W.2d 750 (Mo. 1942).	3
Maryland Casualty Co. v. Commissioner of Insurance, 372 Mass. 554, 363 N.E.2d 1087 (1977).	2

Medallion Insurance Co. v. Whartenbee, 568 S.W.2d 599 (Mo. App. 1978).	3
Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982).	23
Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).	20
Motlow v. Southern Holding & Securities Corp., 95 F.2d 721 (8th Cir. 1938), <i>cert. denied</i> , 305 U.S. 609 (1938).	16
New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 2506 (1989).	7,20
Penn Central Casualty Co. v. Commonwealth of Pennsylvania, 294 U.S. 189 (1935).	21
Steffel v. Thompson, 415 U.S. 457, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).	24
Tafflin v. Levitt, 493 U.S. 455, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990).	24
Trainor v. Hernandez, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977).	23
United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962).	24
United States Department of the Treasury v. Fabe, ___ U.S. ___, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).	12,22
Willcox v. Consolidated Gas Co., 212 U.S. 19, 29 S.Ct. 192, 53 L.Ed.2d 382 (1909).	21

Wilton v. Seven Falls Co., ___ U.S. ___, 115 S.Ct. 2137 (1995).	21
Wolfson v. Mutual Benefit Life Ins. Co., 51 F.3d 141 (8th Cir. 1995).	4,24
Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).	7,8
Zuickler v. Koota, 389 U.S. 241, 88 S.Ct. 391 (1967). ..	24
Statutes:	
15 U.S.C. §§ 1011-15.	22
Mass. Gen. L. ch. 175J (1987).	2
Mass. Gen. L. ch. 175, § 6 (1987).	2
Mass. Gen. L. ch. 175, §§ 180A-180L (1987 & Supp. 1995).	2
Mass. Gen. L. ch. 175, § 180B (1987 & Supp. 1995). ..	2
Mass. Gen. L. ch. 175, § 180C (1987).	2
Mo. Rev. Stat. § 375.954 (1994).	3
Mo. Rev. Stat. § 375.958 (1994).	3
Mo. Rev. Stat. § 375.1160 (1994).	3
Mo. Rev. Stat. § 375.1166 (1994).	3
Mo. Rev. Stat. § 375.1174 (1994).	3
Mo. Rev. Stat. § 375.1176 (1994).	3
Mo. Rev. Stat. § 375.1182.5 (1994).	3
Haw. Rev. Stat. § 431:15-103.5(5) (1993).	17
Md. Ins. Code Ann. § 131 B(5) (Supp. 1995)	17

R.I. Gen. Laws § 27-14.2-2 (1994)	17
Wis. Stat. Ann. ch. 645, preliminary comment (West 1995).....	13
Wis. Stat. Ann. § 645.01 (4)(a) (West 1995).	11
Wis. Stat. Ann. § 645.01, comment on sub. (4)(a) (West 1995).....	11
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Wis. Stat. Ann. § 645.49, comment on sub. (1) (West 1995).....	15
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No. 95-244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHUCK QUACKENBUSH, Insurance Commissioner of the State of
California, in his capacity as Liquidator and Trustee of the Mission
Insurance Company Trust, Mission National Insurance Company
Trust, Enterprise Insurance Company Trust, Holland-America
Insurance Company Trust and Mission Reinsurance Corporation Trust,
Petitioner,

VS.

ALLSTATE INSURANCE COMPANY,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF OF THE COMMONWEALTH OF
MASSACHUSETTS AND THE DIRECTOR OF
INSURANCE OF THE STATE OF MISSOURI AS
AMICI CURIAE IN SUPPORT OF PETITIONER,
CHUCK QUACKENBUSH,
INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA**

INTEREST OF AMICI CURIAE

Both the Commonwealth of Massachusetts and the State of
Missouri, through the respective chief officials of their insurance

departments, have in force comprehensive statutory provisions for the regulation of insurance within their jurisdictions. As part of this comprehensive system, the two also provide for regulating the insurance companies subject to their jurisdiction when those companies become financially impaired.

The Commonwealth of Massachusetts extensively regulates the business of insurance. Linda Ruthardt is the Commissioner of Insurance of the Commonwealth of Massachusetts ("Commissioner"). The Massachusetts Legislature has given the Commissioner "very broad supervisory powers over insurance companies." *Commissioner of Insurance v. Century Fire & Marine Insurance Co.*, 373 Mass. 473, 476-77, 367 N.E.2d 842 (1977). In particular, she "has long been charged by statute with the responsibility to oversee the financial stability of insurance companies." *Maryland Casualty Co. v. Commissioner of Insurance*, 372 Mass. 554, 562, 363 N.E.2d 1087 (1977). The Legislature has enacted a comprehensive statutory scheme to provide for the supervision, rehabilitation and liquidation of troubled companies doing business in the Commonwealth. See Mass. G.L. c. 175J (supervision); Mass. G.L. c. 175, § 6 (receivership); Mass. G.L. c. 175, §§ 180A-180L (rehabilitation and liquidation).

The Massachusetts Legislature has placed the process of conserving, rehabilitating or liquidating insurers under the direct supervision of the Supreme Judicial Court. See Mass. G.L. c. 175, §§ 6, 180B, 180C. These statutes require the Commissioner to apply to the single justice session of the Supreme Judicial Court for appointment as a receiver. Over recent years, the Commissioner has been appointed domiciliary or ancillary receiver for the purposes of rehabilitating or liquidating several insurance companies. She is presently receiver of three Massa-

chusetts insurers, subject to the continuing oversight of the Supreme Judicial Court.¹

Jay Angoff is the duly appointed Director of the Department of Insurance of the State of Missouri. In that capacity, he acts as statutory supervisor, rehabilitator and liquidator of troubled and insolvent insurance companies in both domiciliary and ancillary proceedings relating to the management of those types of entities. §§ 375.954, 375.958, 375.1174, 375.1160, 375.1166 and 375.1176, RSMo 1994. In serving in these capacities, the Director operates under a comprehensive system for the exercise of the state's police power in protecting the public and specific policyholders from the financial difficulties of affected insurance companies. *Klaber v. O'Malley*, 90 S.W.2d 396 (Mo. 1936); *Lucas v. Manufacturing Lumbermen's Underwriters*, 163 S.W.2d 750 (Mo. 1942); *Medallion Insurance Co. v. Whartenbee*, 568 S.W.2d 599, 601 (Mo. App. 1978). Further, by statute, the Director acts under the direct oversight of the Circuit Court of Cole County in carrying out these functions. Mo. Rev. Stat. §375.1182.5 (1994).

The Commonwealth of Massachusetts and the State of Missouri have an interest in this case for a variety of reasons. First, and foremost, the core issue of the interjection of federal courts into a comprehensive state regulatory scheme involving the financial condition of insurance companies will substantially affect the ability of the two State insurance regulators to carry out the state statutory mechanisms for dealing with financially impaired companies, whether those companies be in liquidation, rehabilitation or supervision.

¹ *Commissioner of Insurance v. American Mutual Liability Insurance Co., et al.*, No. 89-23 (Supreme Judicial Court for Suffolk County (liquidation)); *Commissioner of Insurance v. Monarch Life Insurance Co.*, No. 94-268 (Supreme Judicial Court for Suffolk County (rehabilitation)); *Commissioner of Insurance v. Abington Mutual Insurance Co.*, No. 95-278 (Supreme Judicial Court for Suffolk County (rehabilitation)).

Second, the Commonwealth and the State are interested because the federal courts in both States have taken a position on the issue before the Court which is diametrically opposed to the position of the Ninth Circuit. In *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995), the Eighth Circuit (the Circuit within which the State of Missouri is located) held that *Burford* abstention is not dependent on the existence of equitable remedies in the case. In *Doughty v. Underwriters at Lloyds, London*, 6 F.3d 856 (1st Cir. 1993), the First Circuit (the Circuit within which the Commonwealth of Massachusetts is located) held that a district trial court did not abuse its discretion when it abstained from exercising jurisdiction under such circumstances.

The *amici* assert that the Ninth Circuit approach in *Garamendi v. Allstate Insurance Co.*, 47 F.3d 350 (9th Cir. 1995), incorrectly states the law with respect to abstention, particularly in the area of the regulation of financially impaired insurers. The adoption of the Ninth Circuit approach will substantially impede their State insurance regulators in their ability to effectively regulate the financial impairment of insurance companies within their jurisdictions.

Both *amici* have a substantial interest in seeing that a financially troubled insurer is supervised, rehabilitated or liquidated in a manner which best protects the policyholders of the company, its creditors and the general public. This interest includes, and is best furthered by, a system of regulation comprised of a single regulator subject to the control of a single judicial forum in the delinquency proceeding. This issue is not one limited to the State of California. It will affect the capacity of each of the State insurance regulators to alleviate the threat to public welfare posed by financially impaired insurance companies. This brief is intended to provide the Court with a perspective national in scope of how the abstention issue affects the state regulator in his or her regulation of financially troubled insurers, particularly those in liquidation proceedings facing reinsurance issues.

SUMMARY OF ARGUMENT

I.

Every state has established a comprehensive system of regulation of insurers in the area of supervision, rehabilitation and liquidation of financially impaired insurers. Abstention by federal courts in cases before them is particularly apt to these type of proceedings under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Litigation in the federal courts in this area can only lead to a disruption of state efforts to establish a coherent policy with respect to administration of the affairs of financially impaired insurers. The Ninth Circuit's decision in *Garamendi v. Allstate Insurance Co.*, 47 F.3d 350 (9th Cir. 1995), incorrectly decided that a federal district court could not abstain from exercising jurisdiction in actions at law in cases closely related to the collection and distribution of assets of the insolvent company's estate.

The Ninth Circuit's conclusion that the decision to abstain is to be based on archaic classifications rather than contemporary policy considerations must necessarily result in decisions which thoughtful reflection would regret. Considerations of comity and respect for the federal nature of our political system present a more rational basis to resolve the abstention issue. The Ninth Circuit approach would establish a restricted gateway through which a party bringing the abstention issue to the court must first pass in order to have the issue considered. Under this view, only those carrying the equity "password" would be allowed to enter accompanied by the issue of abstention. Those who carry the law "password" must leave the issue at the gateway upon entry.

The abstention issue was not intended to be so limited. A decision based on the allocation of power between an equity chancellor and a judge at law is not adequate to resolution of an issue seeking to balance the substantial interests of the States in an unfettered comprehensive scheme of regulation and the

Federal interest in providing a federal forum for disputes. As the district court recognized, abstention is necessary in order to leave to the state courts the determination of the legal issues so inextricably intertwined with the state's substantial interest in controlling and supervising the processes of rehabilitation and liquidation. Abstention is proper in this case. The decision of the Court of Appeals should be reversed.

ARGUMENT

A.

ABSTENTION IS A BALANCING PROCESS CALLING FOR A WEIGHING OF STATE AND FEDERAL INTERESTS, NOT A MECHANICAL TEST BASED ON THE FORM OF ACTION.

Abstention² is a doctrine of the federal courts rooted in policy not forms of actions. While there are policy reasons justifying independent analysis of cases arising under the different types of abstention, *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 359-60, 109 S.Ct. 2506, 2513-14, 105 L.Ed.2d 298 (1989), abstention doctrines reflect the federal nature of our political system ("Our Federalism") and the need for comity between the States and National government. Abstention is appropriate to "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44-45, 91 S.Ct. 746, 750-51, 27 L.Ed.2d 669 (1971). Implicit in the abstention doctrine is a balancing, a "sensitivity to the legitimate interests of both State and National Governments, and

² The terms "abstention" and "abstain" are used in this brief in their generic sense to refer to the doctrines by which a federal court determines to not exercise jurisdiction over a case in deference to a State proceeding involving the same parties and issues. While the Court has noted that there are actually two remedies which must follow from the application of the "abstention" policy (deferral and dismissal), *Grove v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 1080 & n. 1 (1993), the issue addressed by the amici here is whether the principle which calls for deferral and abstention should be applied to actions at law.

in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” *Id.* Thus, the consideration of the abstention issue, in any context, should focus on the relative interests of the Federal and State Governments involved and not on the form of action or relief to be afforded.

B.

THE STATE INTEREST IN A COMPREHENSIVE RECEIVERSHIP PROCEEDING OUTWEIGHS THE FEDERAL INTEREST IN PROVIDING A FEDERAL FORUM.

This action grew out of the financial impairment of the Mission Insurance Companies. Initially, those companies were placed in conservatorship by the courts of California on October 31 and November 26, 1985.³ Subsequently, on March 5, 1987, the companies were placed in liquidation. The Commissioner of Insurance of the State of California was appointed as receiver for the companies in liquidation.

The dispute between the Receiver and Allstate Insurance Company stemmed from reinsurance contracts between the insolvent companies and Allstate which involved both companies reinsuring the primary insurance obligations of the other. Allstate filed several claims in the liquidation proceedings, as did other reinsurers of the insolvent companies. [Petition for Writ of Certiorari at 7 & n. 13.] The claims raised the same issues which were presented to the district court. [*Id.*] In June of 1990, the Receiver brought suit against Allstate and other reinsurers to recover money due the estate under the reinsurance contracts.

³ Unless specifically noted otherwise, the discussion of the facts specific to this case are taken from the decision of the Court of Appeals.

The causes of action in that suit consisted of declaratory relief, breach of contract, and various civil conspiracy theories.⁴

Allstate removed the action to the United States District Court for the Central District of California on the basis of diversity jurisdiction. Diversity was obtained because all non-diverse parties were settled out of the case. [Order of District Court, Appendix B to Petition for Writ of Certiorari at 15a-16a.]

These case-specific facts serve as a back-drop for a consideration of the two interests to be balanced in the consideration of the abstention issue. There are two factors of note concerning these facts. First, as to the interests of the State, the action arose within the confines of a liquidation proceeding of an insolvent insurance company. Thus, the weight to be afforded the State is to be determined on the basis of the importance of these proceedings to the State. Second, as to the Federal interest involved, federal jurisdiction was premised on diversity jurisdiction. There was no federal question arising out of a federal statute or constitutional provision which would control the substantive rights of the parties.

1. The Strong State Interest in Consolidated Regulation of Troubled Insurers Has Long Been Recognized.

State regulation of insolvent insurance companies dates back to at least 1851 when New York passed a statute permitting the state comptroller to apply to a state court for the dissolution and liquidation of a life insurance company on a showing that its

⁴ This was the second suit brought by the Receiver against a group of reinsurers of the insolvent companies. The first case involved approximately 300 reinsurers of the companies. That action was consolidated with the liquidation proceedings.

assets were insufficient to meet its obligations. Laws of 1851, ch. 95, § 6, Denio & Tracy's Revised Statutes of the State of New York I:1288, § 30 (1852). Subsequently, state regulation of insurance company insolvency has become increasingly more complex with the result that current statutes provide for a unitary, integrated process of regulation of companies which are financially impaired. *See, generally, S. Kimball, History and Development of the Law of State Insurer Insolvency Proceedings: An Overview*, in "Law and Practice of Insurance Company Insolvency," (American Bar Ass'n 1986)(hereafter Kimball). The modern statutes, with rare exception, are premised on either the National Conference of Commissioners on Uniform State Laws' Uniform Insurer's Liquidation Act (hereafter the Uniform Insurer's Liquidation Act) or the National Association of Insurance Commissioners' Model Supervision, Rehabilitation, and Liquidation Act (hereafter the NAIC Model Act). *Id.* at 37. The Uniform Insurer's Liquidation Act was adopted by the National Conference of Commissioners on Uniform State Laws in 1939. *Id.* at 21. The NAIC Model Act was adopted in 1977 by the National Association of Insurance Commissioners, but was largely based on the Wisconsin Liquidation Act, Wis. Stat. Ann. §§ 645.01-.90 (West 1995), which had been passed in 1967. Kimball at 39.

An overriding purpose of both the Uniform Insurer's Liquidation Act and the NAIC Model Act was to provide for a comprehensive regulation of the insolvency process.⁵ This is made clear

⁵ Amici's focus on regulation of insolvency as the State interest most directly presented by this case is not intended to exclude other interests. The States have strong interests in the comprehensive regulation of the condition of troubled insurers through all manner of delinquency proceedings, including administrative supervision, conservatorship and rehabilitation proceedings. The States' interests encompass receiverships of insurers to reduce the

(Footnote 5 continued on next page)

in the comments to the Wisconsin statute on which the NAIC relied in drafting their Model Act:

Par. (f) has a precise purpose. It is intended to make it clear beyond doubt that this chapter is perceived by the legislature as, and in fact is, part of the regulatory structure. It is a part of the regulatory system because this chapter will have considerable effect on the way the insurance business is conducted by reinsurers, agents, premium financiers, and others.

Wis. Stat. Ann. § 645.01, *comment on sub. (4)* (West 1995). Thus, under paragraph (f) of that section, the means by which the interests of insureds, creditors and the general public are to be protected is to extend regulation of the insurance industry to delinquency proceedings. *Id.* § 645.01 (4) (f). The NAIC Model Act incorporated this same concept in its statement of purpose: "Providing for a comprehensive scheme for the rehabilitation and liquidation of insurance companies and those subject to this Act as part of the regulation of the business of insurance, insurance industry and insurers in this state. Proceedings in cases of insurer insolvency and delinquency are deemed an integral aspect of the business of insurance and are of vital public interest and concern." NAIC Model Act, § 1.D (7). *See,*

(Footnote 5 continued)

risk of loss due to mismanagement, and not just after-the-fact liquidations to minimize unavoidable loss. *See Kuecklehan v. Federal Old Line Insurance Co.*, 69 Wash.2d 392, 418 P.2d 443, 461 (1966); *Attorney General v. North American Life Insurance Co.*, 82 N.Y. 172, 184-85 (1880). As illustrated by the Wisconsin statute, one of the primary purposes of the modern statutes is "Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures, neither unduly harsh nor subject to the kind of publicity that would needlessly damage or destroy the insurer . . ." Wis. Stat. Ann. § 645.01(4)(a) (West 1995). This concept of early detection and intervention and measures short of liquidation is said to pervade the entire statutory chapter on troubled insurers. *Id.*, *comment to sub. (4)(a)*.

Appendix, § IV at A-11 to A-12.. The Court has also recognized that the insolvency process involves the regulation of insurance. *United States Department of the Treasury v. Fabe*, ___ U.S. ___, 113 S.Ct. 2202, 2210, 124 L.Ed.2d 449 (1993).

A survey of the statutes of the States on the liquidation process, *see* Appendix, evidences a consensus on the two overriding principles which will lead to a liquidation which best protects the policyholders, creditors and the general public. These are (1) that consolidation of the proceedings to the greatest extent possible benefits all concerned: and (2) regulatory decisionmaking within the context of liquidation best is done by the person with the greatest knowledge of the complexities of the insurance industry. This person is the State's insurance regulator. This second principle recognizes that this person, under the oversight of a state court, should make the primary decisions concerning the liquidation process. The statutory provisions touching on the abstention issue implement one or both of these overriding principles.

The roles of the parties to the liquidation proceeding and their interests are also important. In the overwhelming number of insurance company receiverships, an insurer is put into liquidation because it is financially troubled and that financial condition poses a threat to the interests of the policyholders, creditors and the general public. *See* Appendix § IX at A-18 to A-23. The State insurance regulator as liquidator is solely concerned with what is best and fairest for all concerned — how are a limited, usually insufficient, amount of assets to be distributed among competing claims?

There are two factors which will largely influence the success of the liquidator in his or her efforts. These are the marshalling of assets and the resolution of claims. Experience has shown that there may be a dispute as to an entitlement to or the amount of either. In determining the interest of the State, then, in the abstention equation (and, for that matter, the Federal interest) it

should be borne in mind that the holder of the disputed asset or claim enters any action on that dispute with a goal of maximizing its benefit at the expense of those interested in the liquidation estate. It should also be borne in mind that the liquidation statutes have provided for the fair and efficient resolution of these adversarial disputes within the liquidation court through procedures to be conducted before a neutral, competent tribunal.

Consolidation of control over the proceedings by which the insolvency is regulated is the first of the two common and overriding principles embodied in the comprehensive state statutory schemes. *See Garamendi v. Executive Life Ins. Co.*, 21 Cal. Rptr. 2d 578, 585 (Cal. App. 1993), *review denied* 1993 Cal. LEXIS 5639 (1993); *In re Rehabilitation of Mutual Benefit Life Insurance Co.*, 609 A.2d 768, 774 (N.J. App. Div. 1992). The Wisconsin statute was modeled after the federal bankruptcy act then in existence in part to provide for the singular control over the process afforded by that act. *See* Wis. Stat. Ann. ch. 645 *Preliminary Comment*, Liquidation (West 1995). Proceedings in accordance with the state's chapter on liquidation of insurers is the sole and exclusive means of liquidating, rehabilitating, reorganizing or conserving an insurer. *See* Appendix, § VII at A-16 to A-17. On issuance of an order of insolvency, no action may be taken or continued against an insurer or the liquidator outside of the insolvency proceedings. *See* Appendix, § XVI at A-33 to A-34. The ability to put an insurer into receivership is premised on various standards, including that the company has been the subject of successful or attempted liquidation proceedings other than a proceeding under the state's insurer delinquency chapter.⁶ *See* Appendix, § IX at A-18 to A-23.

⁶ The intent of this type of provision is to prevent insurers from placing themselves voluntarily into liquidation proceedings, as such proceedings would not necessarily "follow an approved pattern for liquidation," and, thereby not provide the regulatory protection provided by the insurance insolvency statutes over the liquidation of the assets. Wis. Stat. Ann. § 645.41 (7), *comment on sub. 7* (West 1995).

This concept of consolidation is also carried out in the provisions dealing with the claims process. With respect to claims against the estate, the insolvency proceedings are the exclusive forum for the filing and resolution of claims. Any judgment against the insolvent insurer entered in a proceeding outside the insolvency proceeding and after the entry of the order of insolvency does not have to be considered as proof of the insolvent insurer's liability or the amount of damages. See Appendix, § XX at A-40 to A-41. In other words, such a judgment entered outside of the receivership proceedings may be treated as advisory only within the proceedings themselves.

Equally emphasized in the statutes is the second principle that control over the proceedings must be vested in the State insurance regulator. The state insurance regulator is normally the only one who can seek a court order for liquidation of a company.⁷ See Appendix, § V at A-12 to A-14. With only one exception, the state insurance regulator is required to be appointed as receiver in the proceedings. See Appendix, § X at A-23 to A-25.

In the capacity of receiver, the state insurance regulator succeeds to the title of the assets of the insolvent insurer and is directed to take possession of those assets. See Appendix, § XI at A-25 to A-27. To accomplish this, the state insurance regulator has the power to take the actions necessary to collect those assets, including intervention in proceedings outside the state in order to protect the assets and prevent outside forums from exercising control over them. See Appendix, §§ XII at A-28 to 29; XIV at A-30 to A-31; XV at A-32 to A-33; XVII at A-34 to A-35. As receiver, the state insurance regulator is given substantial discretion as to the forum in which he may proceed

⁷ There is an exception in those states adopting the NAIC Model Act which allows for three creditors of the company to seek a liquidation order, but only after allowing the state insurance regulator the opportunity to review the complaint and take action. See Appendix § VI at A-14 to A-15.

to collect the assets of the estate or otherwise carry out the duties of his office. See *Id.* As outlined in the comments to the Wisconsin statute, this discretion is a necessary component of the regulatory process:

The entire subject of the effect of liquidation upon actions brought elsewhere is very complex. What the statute does is to give the liquidator all possible tools and leave it to him to decide, in a concrete context, which ones to use and how to use them. This is the reason for empowering the commissioner to intervene in foreign lawsuits, and to petition for immediate dissolution, among other powers.

Wis. Stat. Ann. § 645.49, *comment on sub. (1)* (West 1995).

The foregoing survey of the statutory framework for insurance insolvency proceedings illustrates the substantial interest of the States in maintaining control over the insolvency process as an integral part of their regulation of insurance. Except in rare circumstances, the State's regulatory interest will dictate that all matters related to the insolvency be consolidated in a single legal forum. In those rare circumstances when resort to another forum may be undertaken, it is the result of an informed determination by those responsible for the regulation of the insolvency process that the best interests of the State are carried out by allowing a separate forum to consider a question or questions related to the liquidation of the company. This interest was recognized by the federal courts even before the adoption of the more comprehensive insurance insolvency codes:

Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. Hence, other courts, except when called upon by the court of

primary jurisdiction for assistance, are excluded from participation. This should be particularly true as to proceedings for the liquidation of insolvent insurance companies for the reasons adverted to by Mr. Justice Cardozo in *Clark v. Willard*, 292 U.S. 112, 123 [(1934)].

Motlow v. Southern Holding & Securities Corp., 95 F.2d 721, 725-26 (8th Cir.), cert. denied, 305 U.S. 609 (1938).

2. As An Important Asset of An Insurer, Reinsurance Is Necessarily an Integral Part of Insurance Receivership Proceedings.

Within the general framework of state regulation of insurance insolvency, there is the more specific consideration of the role of reinsurance within that regulatory process. First, it should be noted that reinsurance is at the core of a company's financial status. Reinsurance recoverables are treated as assets of the ceding company. See Appendix, § I at A-1 to A-2. More importantly, the mere existence of reinsurance will determine the amount of surplus and reserves required to be maintained by a company, reinsurance being allowed as a credit to the company's assets or a deduction from its liabilities, thereby reducing the amount of liquid assets which a company must maintain. See Appendix, §§ II at A-2 to A-10; III at A-10 to A-11. The reinsurance relationship is going to have a significant role in determining whether a company is financially impaired and subject to regulation as an insolvent insurer.

In fact, reinsurance practices resulting in reinsurance proceeds becoming uncollectible are seen as one of the contributing factors to many insurance company insolvencies. F. Semaya, *Insurance Insolvency - Where We Are Today* in "Law and Practice of Insurance Company Insolvency Revisited" 1, at 10-11 (American Bar Ass'n 1989) (hereafter Semaya). It is also specifically recognized by the Hawaii statute on supervision, rehabilitation and liquidation, that the troubled financial condition of a ceding company's reinsurer may be grounds for

instituting delinquency proceedings against the ceding company.⁸ Haw. Rev. Stat. §431:15-103.5 (5) (1993).

Reinsurance is also integral to the insurer insolvency proceedings. "Just as reinsurance is important to the operations of an insurer, it is equally important to a receiver. Reinsurance receivables often represent the estate's largest asset." National Association of Insurance Commissioners, "Receivers Handbook for Insurance Company Insolvencies at 7-1 (NAIC 1992).⁹ In the receivership proceeding underlying this case, it was estimated that there was over \$400,000,000.00 in reinsurance receivables due the estate. [Complaint, ¶ 9, *Roxani Gillespie v. Allstate Insurance Co. et al.*, Case No. 6751868 (Superior Court

⁸ The statute provides that among the factors which will support a determination that continued operation of a company would be hazardous to policyholders, creditors and the general public is "[t]he ability of an assuming reinsurer to perform and whether the insurer's reinsurance program provides sufficient protection for the company's remaining surplus after taking into account the insurer's cash flow and the classes of business written as well as the financial condition of the assuming reinsurer. . . ." Haw. Rev. Stat. § 431:15-103.5 (5) (1993). See also, Md. Ins. Code Ann. § 1318(5) (Supp. 1995); R.I. Gen. Laws § 27-14.2-2 (1994).

⁹ See, also, D. Spector, *Rights and Obligations of Reinsurers of an Insolvent Ceding Company — A Consideration of Selected Issues*, in "Law and Practice of Insurance Company Insolvency Revisited" 685, at 685 (American Bar Ass'n 1989) ("The breath, body, and blood of the relationship between a reinsurer and the receiver of its insolvent reinsured is the reinsurance proceeds. For many, perhaps most, insolvent insurance company estates, reinsurance is the principle mechanism for financing payment of policyholder and guaranty fund claims. Reinsurance collectibles are often the largest single item on the insolvent insurer's balance sheet"); P. Dassenko, *Obligations and Duties of the Liquidator to Reinsurers: A Liquidator's Perspective* in "Law and Practice of Insurance Company Insolvency Revisited" 661, at 662 (American Bar Ass'n 1989) (hereafter Dassenko) ("One of the major assets of an insolvent insurance company's estate is the right to receive reinsurance proceeds. Therefore, much if not most of the liquidator's time will be spent managing relationships with reinsurers towards the collection of all reinsurance proceeds due the estate").

for the County of Los Angeles).] The suit by the Receiver in *Doughty* sought to recover \$15,000,000.00 in overdue reinsurance indemnities. 6 F.3d at 859. As an asset, reinsurance recoverables would be available for distribution to those with claims against the estate, when collected, but may also be used by the receiver as security for loans made to the estate. See Appendix, § XIII at A-29 to A-30.

In some states, in recognition of the status of reinsurance recoverables as an asset of the estate, the chapter on delinquency proceedings state that the amount of a reinsurer's liability will not be reduced by the fact that the ceding insurer is in receivership. See Appendix, § XIX at A-39 to A-40. In other states, the very nature of the reinsurance relationship is transformed through what are known as statutory insolvency clauses. These clauses, required to be included in contracts of reinsurance if a company wants to use the reinsurance in determining its financial condition, obligate the reinsurer to pay claims based on the liability of the ceding company even though it has not paid on a claim, as opposed to payment on an indemnity basis. Spector, at 697-700. Both of these types of clauses account for the fact that, typically, most reinsurance contracts are contracts of indemnity requiring the reinsurer to pay only if the ceding company has paid a loss. The effect of these clauses is to increase the assets potentially available to the estate and to make the reinsurance recoverables generally available for distribution. In another statutory provision directed at reinsurers and designed to assist in the marshaling of the estate's assets, those entering into reinsurance contracts with an insurer in rehabilitation or liquidation are subject to the personal jurisdiction of the receivership court. See Appendix § VIII at A-17 to A-18.

From the standpoint of reinsurance as an asset of the insolvent company, one of the most significant provisions is the set-off provision. See Appendix § XVIII at A-35 to A-39. As explained by the NAIC:

Setoff is a device which permits two contracting parties to net reciprocal debt obligations and pay only the remaining balance. It is therefore an important element of any receivership. . . .

In recent years, there has been a significant increase in the number and severity of U.S. insurer insolvencies. As a consequence, there has been a commensurate increase in the value of setoff rights and the economic protection they provide for creditors. However, receivers have a fiduciary duty to assure that all of the insolvent insurer's assets be marshalled for distribution in accordance with creditor priorities established by statute. Amounts allowed to be set off will not be available for ultimate distribution to policyholders and other claimants, since such amounts are not assets of the insurer.

Development of an effective approach to setoff must begin with a careful analysis of both the applicable provisions of the domiciliary state's statute and relevant case law. Setoff is an area of considerable controversy. Setoff rights may vary depending upon whether the insurer is subject to either a rehabilitation or a liquidation proceeding.

National Association of Insurance Commissioners, "Receivers Handbook for Insurance Company Insolvencies" at 7-27 (NAIC 1992). As recognized by the Ninth Circuit in the decision here under review, the effect of the set-off provision is to grant the reinsurer a first priority among claims for the amounts subject to set-off. *Garamendi*, 47 F.3d at 352 n. 5. Whether reinsurers should be given such an advantage was a matter of considerable concern and debate when the Wisconsin statute was drafted and the NAIC Model Act was adopted. Kimball at 35-36, 39-42. It is still a question of considerable controversy, both as to whether it should exist and, if existent, the extent of what is to be set off. Semaya, at 19-20; Dassenko at 663-672.

What is illustrated here is that both reinsurance and set-off are a key part of the State insurance insolvency regulatory process. Within this regulatory process, neither the issues surrounding reinsurance as an asset nor those concerning the availability or breadth of the right of set-off can be carved out of this system of regulation for separate treatment. The State has as substantial an interest in controlling the handling of this issue in the insolvency process as it does any other issue, such as the resolution of claims not subject to set-off. In terms of the federal abstention issue and the balance to be reached between the State and Federal interests in the application of the doctrine, the interest of the State is the need for the concentration of the reinsurance and set-off issues in a singular regulatory forum that minimizes interference from outside sources. Without this concentration, the complete and adequate regulation of the insolvency process becomes impaired.

3. The Federal Interest In Providing A Federal Forum Is a Minimal One In the Context of This Case.

On the Federal side of the equation, the abstention doctrine potentially implicates two Federal interests. First, there may be a federal substantive right based on the Constitution or federal statute which the National government would have an interest in seeing upheld or vindicated. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 26-26, 103 S.Ct. 927, 941-41, 74 L.Ed.2d 765 (1983). When such an issue is present in a case, it "must always be a major consideration weighing against surrender" of jurisdiction. *Id.*

Second, and common to all abstention cases, is the Federal interest in access to its courts. This interest has been expressed by the Court in the following language: "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *NOPSI*, 491 U.S. at 358-59,

109 S.Ct. at 2513, *quoting Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40, 29 S.Ct. 192, 195, 53 L.Ed. 382 (1909).

In a case such as this one, based on federal diversity jurisdiction, the only Federal interest in the abstention equation which is implicated is the procedural interest of preserving access to and obtaining an adjudication from the Federal courts. There is no Federal substantive issue to be given weight in the balancing process.

C.

THE EQUITY/LAW DISTINCTION SHOULD HAVE NO ROLE IN THE DISTRICT COURT'S DECISION WHETHER TO ABSTAIN.

The Federal interest is not immutable. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976), *quoting County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959). When a declaratory judgment is sought, the standard is less strenuous. *Wilton v. Seven Falls Co.*, ___ U.S. ___, 115 S.Ct. 2137, 2143 (1995).

The underlying interests of the State in insurance insolvency proceedings do present the exceptional circumstances calling for abstention. *See Penn Central Casualty Co. v. Commonwealth of Pennsylvania*, 294 U.S. 189 (1935). The case is clearly within the factors favoring abstention as set out in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed.2d 1424 (1943), and

Colorado River, supra. The insolvency process involved is a well-organized system of regulation and judicial review furthering substantial State concerns to which the federal courts could make small contribution through their determination of questions of State law. *Burford*, 319 U.S. at 327, 63 S.Ct. at 1104.

Similarly, as recognized by *Fabe, supra*, the insurance insolvency process is within the pronounced federal policy to avoid federal interference with the State regulation of insurance. Where such a policy exists and federal court action would interfere with a comprehensive state system for adjudicating rights among highly interdependent relationships, abstention is appropriate. *Colorado River*, 424 U.S. at 819, 96 S.Ct. at 1247. *see, also, Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S.Ct. 3200, 77 L.Ed.2d 837 (1983). Indeed, to the extent that the federal proceedings interfere with the regulation of the insolvency process, abstention should be required under application of the McCarran Ferguson Act on the basis that the more general statute on federal jurisdiction must yield to the more specific statute restricting Federal regulation of the business of insurance. *See* 15 U.S.C. §§ 1011-15; *Fabe*, 113 S.Ct. at 2212.

There are other factors identified by the Court in its abstention cases favoring abstention in the circumstance of insurance insolvency proceedings. As noted in *Harrison County Commissioners Court v. Moore*, 420 U.S. 77, 84, 95 S.Ct. 870, 875, 43 L.Ed.2d 32 (1975) (Pullman abstention), "when the state law questions have concerned matters peculiarly within the province of the local courts, we have inclined towards abstention." Similarly, there are certain matters over which the State has primacy and the federal courts must neither affirmatively obstruct such matters nor allow themselves to be used to impede the State in those matters. *Grove v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 1081 (1993) (Pullman abstention). When the federal action is ancillary to, and in furtherance of a broader State policy of

substantial interest, abstention is justified. *Trainor v. Hernandez*, 431 U.S. 434, 444, 97 S.Ct. 1911, 1918, 52 L.Ed.2d 486 (1977) (Younger abstention). The federal courts should also abstain when the matter under consideration goes to the core of the administration of a State's established system of adjudication or regulation. *Juidice v. Vail*, 430 U.S. 327, 335, 97 S.Ct. 1211, 1217, 51 L.Ed.2d 376 (1977) (Younger abstention). The State's interest in its regulation of a profession or industry for the protection of the public, prevention of a re-occurrence of wrongs, and assurance and maintenance of high standards of conduct outweigh the Federal interests considered in the abstention issue. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 435, 102 S.Ct. 2515, 2523, 73 L.Ed.2d 116 (1982).

From a policy standpoint, the support for abstention in this case is overwhelming. It has been denied by the Ninth Circuit not because the Federal interests outweigh considerations of federalism or comity, but because of a mechanical distinction between actions at law and actions in equity. The Ninth Circuit approach, as set out in *Garamendi v. Allstate Insurance Co.*, 47 F.3d 350 (9th Cir. 1995), unduly restricts the balancing called for in the abstention doctrine to cases in equity. Its approach seeks to set up a gateway to consideration of the issue. The abstention issue may only enter into a case through this gateway. If the case involves a traditional equitable relief, the issue is allowed to pass through the gateway and comes before the district court for its consideration. If it involves a traditional relief at law, the issue is denied entry to the case and consideration by the court altogether.

Within the context of the abstention issue, the distinction drawn by the Ninth Circuit between an action in equity and an action at law is an artificial one. The balance between the Federal and State interests in the case will be the same whether the case is one at law or equity. The problem with the rule announced by the Ninth Circuit is that a focus on the equity/law distinction is

a focus on the *remedy* to be afforded and not on the *jurisdictional* question of whether the State interests involved outweigh the Federal interest in vindicating and protecting the right of a party to have its case considered by the Federal court. The Court has already noted that the abstention issue is not remedy focused. *Zuickler v. Koota*, 389 U.S. 241, 254, 88 S.Ct. 391, 399 (1967), citing *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 n. 13, 92 S.Ct. 1749, 1756 n. 13, 32 L.Ed.2d 257 (1972) ("The question of abstention, of course, is entirely separate from the question of granting declaratory or injunctive relief"); *Steffel v. Thompson*, 415 U.S. 1209, 474 n. 21, 94 S.Ct. 1209, 1223 n. 21, 39 L.Ed.2d 505 (1974).

Other Circuit Courts considering abstention in light of the equity/law distinction have rejected the idea that the distinction is one which should control the balancing of the Federal and State interests undertaken by the abstention issue. *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995); *General Glass Industries Corp. v. Monsour Medical Foundation*, 973 F.2d 197 (3rd Cir. 1992). More important, there is nothing in the Court's treatment of the issue which calls for such a distinction. The Court has previously upheld or required abstention where the issues before the district court were actions at law rather than in equity. *Tafflin v. Levitt*, 493 U.S. 455, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990)(RICO damages); *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981) (damages under 42 U.S.C. § 1983); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962); *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207, 80 S.Ct. 1222 (1960)(claim for recovery of proceeds due under insurance contract); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070 (1959)(condemnation action).

The Ninth Circuit dismissed the *Fair Assessment in Real Estate* and *Louisiana Power & Light* cases on the basis that these constituted "'special' classes of damage actions." This characterization highlights that the Ninth Circuit improperly focuses on remedy in setting up its gateway to the abstention issue. This Court's discussion of the special nature of the state system for taxation in *Fair Assessment* and of the power of eminent domain in *Louisiana Power & Light* was not intended as a justification for exercising the abstention doctrine in actions at law. It was an explanation of the substantial nature of the State interest involved in the proceedings.¹⁰ Abstention in cases at law is not foreclosed.

That the equity/law distinction should not control the issue is best illustrated by *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 99 L.Ed.2d 296, 108 S.Ct. 1133 (1988). There the Court held that in an age where law and equity have been merged in the federal legal system, where "[s]uits that involve diverse claims and request diverse forms of relief are not easily categorized as equitable or legal," and where the continued promulgation of rights and procedures have little reference to these outmoded jurisdictional and remedial distinctions, those distinctions should no longer be controlling. 485 U.S. at 283-85. What the Court said concerning the exercise of appellate jurisdiction has equal application to the abstention issue:

More important, the Enelow-Ettelson doctrine is "divorced from any rational or coherent appeals policy." Under the rule, appellate jurisdiction of orders granting or denying

¹⁰ Even if the discussion was a justification for the exercise of abstention, this case would come within the same justification. If the two cases recognize the existence of special cases at law which share the characteristics of equity proceedings, the insurance liquidation proceeding certainly comes within the ambit of that "special" type of proceeding. See, e.g., *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176 (1935)(an action in receivership involves the exercise of equitable powers).

stays depends upon a set of considerations that in no way reflects or relates to the need for interlocutory review. There is no reason to think that appeal of a stay order is more suitable in cases in which the underlying action is at law and the stay is based on equitable grounds than in cases in which one of these conditions is not satisfied. The rule's focus on historical distinctions thus produces arbitrary and anomalous results. Two orders may involve similar issues and produce similar consequences, and yet one will be appealable whereas the other will not.

485 U.S. at 285-86. Adherence to a mechanical equity/law distinction as a precondition to consideration of the abstention issue can only ultimately result in arbitrary and anomalous results in which cases involving similar issues of State concern and having similar consequences on those interests will produce different results — one in which the federal court refrains from interposing itself in the State interest and one in which the federal court does make such an interference.

A decision based on the allocation of power between an equity chancellor and a judge in a court of law is not adequate to resolution of an issue seeking to balance the substantial interests of the States in an unfettered comprehensive scheme of regulation and the National interest in providing a federal forum for disputes. The Ninth Circuit's conclusion that the decision to abstain is to be based on archaic classifications rather than contemporary policy considerations must necessarily result in decisions which thoughtful reflection would regret. Considerations of comity and respect for the federal nature of our political system present a more rational basis to resolve the abstention issue.

When the principle underlying the abstention doctrine is applied to the facts of this case, and the issue before the Court, it becomes apparent that abstention is appropriate.

CONCLUSION

The doctrine of *Burford* abstention is not limited to actions involving equitable remedies. The Ninth Circuit too narrowly limits this doctrine in its *Garamendi* decision. The Court should overturn the decision of the Circuit Court and order it to affirm the action of the district court in abstaining in this action.

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APPENDIX

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SURVEY OF INSURANCE INSOLVENCY LAW

I. Reinsurance recoverables are an asset of the company.

Wyo. Stat. Ann. § 26-6-101.

(a) In any determination of an insurer's financial condition, only the following insurer owned assets shall be allowed:

...

(viii) The full amount of reinsurance recoverable by a ceding insurer from a solvent reinsurer and which reinsurance is authorized under W.S. 26-5-111[.]

Similar provisions:

Ala. Code § 27-37-1(8)(1986).

Alaska Stat. § 21.18.010 (9)(1993).

Ariz. Rev. Stat. Ann. § 20-501 (9) (1990).

Ark. Code Ann. § 23-63-601 (9) (1987).

Colo. Rev. Stat. § 10-1-102 (1.5)(h) (1994).

Conn. Gen. Stat. Ann. § 38a-71 (a)(F) (West Supp. 1995).

Del. Code Ann. tit. 18, § 1101 (8) (1989).

Fla. Stat. Ann. § 625.012 (8) (West Supp. 1995).

Ga. Code Ann. § 33-10-1 (9) (Supp. 1995).

Haw. Rev. Stat. § 431:5-201 (8) (1993).

Idaho Code § 41-601 (8) (1991).

Ky Rev. Stat. Ann. § 304.6-010 (1)(h) (Baldwin 1988).

Me. Rev. Stat. Ann. tit. 24-A, § 901.8 (West 1990).

Md. Ins. Code Ann. § 75 (8) (1994).

Mont. Code Ann. § 33-2-501 (8) (1995).

Nev. Rev. Stat. § 681B.010 (8) (1991).

N.M. Stat. Ann. § 59A-8-1 (H) (1991).

N.Y. Ins. Law § 1301 (14) (McKinney 1985).

Okla. Stat. Ann. tit. 36, § 1501.8 (West 1990).

Or. Rev. Stat. § 733.010 (5) (1993).

S.C. Code Ann. § 38-11-40(c) (Law. Co-op. Supp. 1995).
S.D. Codified Laws Ann. § 58-26-1(9) (1990).
Tenn. Code Ann. § 56-2-207(a)(2) (1994).
Utah Code Ann. § 31A-17-201(2)(f) (1994).
W. Va. Code § 33-7-1(h) (1992).
Wyo. Stat. § 26-6-101(a) (1993).

II. Reinsurance as a credit or deduction from liabilities of company.

Mass. Gen. L. ch. 174, § 20A (Supp. 1995).

(1) Credit for reinsurance shall be allowed a domestic ceding insurer as either an asset or a deduction from liability on account of reinsurance ceded only when the reinsurer meets the requirements of paragraph (A), (B), (C) or (D) or paragraph (E) of subsection 2. If meeting the requirements of paragraph (C) or (D), the requirements of paragraph (F) shall also be met.

(A) Credit shall be allowed when the reinsurance is ceded to an assuming insurer which is licensed: (i) to issue policies in the commonwealth covering risks of the same kinds as those reinsured, or (ii) to reinsure in the commonwealth risks of the same kinds as those reinsured.

(B) Credit shall be allowed when the reinsurance is ceded to an assuming insurer which is accredited as a reinsurer in this commonwealth. An accredited reinsurer is one which:

- (i) files with the commissioner evidence of its submission to this commonwealth's jurisdiction;
- (ii) submits to the commonwealth's authority to examine its books and records;
- (iii) is licensed to transact insurance or reinsurance in at least one state, or in the case of a United States branch of an alien assuming insurer is entered through and licensed to transact insurance or reinsurance in at least one state;

(iv) files annually with the commissioner a copy of its annual statement with the insurance department of its state of domicile and a copy of its most recent audited financial statement; and either

(a) maintains a surplus as regards policyholders in an amount which is not less than twenty million dollars and whose accreditation has not been denied by the commissioner within ninety days of its submission; or

(b) maintains a surplus as regards policyholders in an amount not less than twenty million dollars and whose accreditation has been approved by the commissioner.

No credit shall be allowed a domestic ceding insurer, if the assuming insurers' accreditation has been revoked by the commissioner after notice and a hearing.

(C) Credit shall be allowed when the reinsurance is ceded to an assuming insurer which is domiciled and licensed in, or in the case of a United States branch of an alien assuming insurer is entered through, a state which employs standards regarding credit for reinsurance substantially similar to those applicable under this section and the assuming insurer or United States branch of an alien assuming insurer:

(i) maintains a surplus as regards policyholders in an amount not less than twenty million dollars; and (ii) submits to the authority of the commonwealth to examine its books and records; provided, however, that the requirement of clause (i) of paragraph (C) does not apply to reinsurance ceded and assumed pursuant to pooling arrangements among insurers in the same holding company system.

(D) (i) Credit shall be allowed when the reinsurance is ceded to an assuming insurer which maintains a trust fund in a

qualified United States financial institution, as defined in paragraph (3), for the payment of the valid claims of its United States policyholders and ceding insurers, their assigns and successors in interest. The assuming insurer shall report annually to the commissioner information substantially the same as that required to be reported on the National Association of Insurance Commissioners Annual Statement form by licensed insurers to enable the commissioner to determine the sufficiency of the trust fund. In the case of a single assuming insurer, the trust shall consist of a trusteed account representing the assuming insurer's liabilities attributable to business written in the United States and, in addition, the assuming insurer shall maintain a trusteed surplus of not less than fifty million dollars. In the case of a group of individual unincorporated underwriters, the trust shall consist of a trusteed account representing the group's liabilities attributable to business written in the United States and, in addition, the group shall maintain a trusteed surplus of which one hundred million dollars shall be held jointly for the benefit of United States ceding insurers of any member of the group; and the group shall make available to the commissioner an annual certification of the solvency of each underwriter by the group's domiciliary regulator and its independent public accountants.

(ii) In the case of a group of incorporated insurers under common administration which complies with the filing requirements contained in the previous subparagraph, and which has continuously transacted an insurance business outside the United States for at least three years immediately prior to making application for accreditation; and submits to the commonwealth's authority to examine its books and records and bears the expense of the examination, and which has aggregate policyholders' surplus of ten billion dollars; the trust shall be in an amount equal to the group's several liabilities attributable to business ceded by United States ceding insurers to any member of the group pursuant to reinsurance contracts issued in the name of such group; plus the group shall maintain joint trusteed surplus of

which one hundred million dollars shall be held jointly for the benefit of United States ceding insurers of any member of the group as additional security for any such liabilities, and each member of the group shall make available to the commissioner an annual certification of the member's solvency by the member's domiciliary regulator and its independent public accountant.

(iii) Such trust shall be established in a form approved by the commissioner. The trust instrument shall provide that contested claims shall be valid and enforceable upon the final order of any court of competent jurisdiction in the United States. The trust shall vest legal title to its assets in the trustees of the trust for its United States policyholders and ceding insurers, their assigns and successors in interest. The trust and the assuming insurer shall be subject to examination as determined by the commissioner. The trust described herein must remain in effect for as long as the assuming insurer shall have outstanding obligations due under the reinsurance agreements subject to the trust.

(iv) No later than February twenty-eight of each year the trustees of the trust shall report to the commissioner in writing setting forth the balance of the trust and listing the trust's investments at the preceding year end and shall certify the date of termination of the trust, if so planned, or certify that the trust shall not expire prior to the next following December thirty-first.

(E) Credit shall be allowed when the reinsurance is ceded to an assuming insurer not meeting the requirements of paragraph (A), (B), (C), or (D) but only with respect to the insurance of risks located in jurisdictions where such reinsurance is required by applicable law or regulation of that jurisdiction.

(F) If the assuming insurer is not licensed or accredited to transact insurance or reinsurance in the commonwealth, the credit permitted by paragraphs (C) and (D)

shall not be allowed unless the assuming insurer agrees in the reinsurance agreements:

(i) That in the event of the failure of the assuming insurer to perform its obligations under the terms of the reinsurance agreement, the assuming insurer, at the request of the ceding insurer, shall submit to the jurisdiction of an alternative dispute resolution panel or any court of competent jurisdiction in any state of the United States, will comply with all requirements necessary to give such panel or court jurisdiction, and will abide by the final decision of such panel or court or of any appellate court in the event of an appeal of a decision by such panel or court; and (ii) To designate the commissioner or a designated attorney as its true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the ceding company.

This provision is not intended to conflict with or override the obligation of the parties to a reinsurance agreement to arbitrate their disputes, if such an obligation is created in the agreement.

(2) A reduction from liability for the reinsurance ceded by a domestic insurer to an assuming insurer not meeting the requirements of subsection (1) shall be allowed in an amount not exceeding the related liabilities carried by the ceding insurer and such reduction shall be in the amount of funds held by or on behalf of the ceding insurer, including funds held in trust for the ceding insurer, under a reinsurance contract with such assuming insurer as security for the payment of obligations thereunder, if such security is held in the United States subject to withdrawal solely by, and under the exclusive control of, the ceding insurer or in the case of trust, held in a qualified United States financial

institution as defined in paragraph (B) of subsection (3). This security may be in the form of:

(A) Cash.

(B) Securities listed by the Securities Valuation Office of the National Association of Insurance Commissioners and qualifying as admitted assets.

(C) Clean, irrevocable, unconditional letters of credit, issued or confirmed by a qualified United States institution, as defined in paragraph (A) of subsection (3), no later than December thirty-first in respect of the year of which filing is being made, and in the possession of the ceding company on or before the filing date of its annual statement.

Letters of credit meeting applicable standards of issuer acceptability as for the dates of their issuance or confirmation shall, notwithstanding the issuing or confirming institution's subsequent failure to meet applicable standards of issuer acceptability, continue to be acceptable as security until their expiration, extension, renewal, modification or amendment, whichever first occurs.

(D) Any other form of security acceptable to the commissioner.

(3) (A) For purposes of paragraph (C) of subsection (2), a qualified United States financial institution means an institution that:

is organized or, in the case of a United States office of a foreign banking organization, licensed under the laws of the United States or any state thereof; (ii) is regulated, supervised and examined by United States federal or state authorities having regulatory authority over banks and trust companies; and (iii) has been determined by either the commissioner or the Securities Valuation Office of the National

Association of Insurance Commissioners to meet such standards of financial condition and standing as are considered necessary and appropriate to regulate the quality of financial institutions whose letters of credit will be acceptable to the commissioner.

(B) A qualified United States financial institution means, for purposes of those provisions of this section specifying those institutions that are eligible to act as a fiduciary of a trust, an institution that:

(i) is organized, or, in the case of a United States branch or agency office of a foreign banking organization, licensed, under the laws of the United States or any state thereof and has been granted authority to operate with fiduciary powers; and (ii) is regulated, supervised and examined by federal or state authorities having regulatory authority over banks and trust companies.

(4) No credit shall be allowed to any ceding insurer for reinsurance unless, by the terms of a written reinsurance agreement, the reinsurance is payable by the assuming insurer on the basis of the liability of the ceding insurer under any policy or contract reinsured without diminution because of the insolvency of the ceding insurer. Any reinsurance agreement may provide that the liquidator or receiver or statutory successor of an insolvent ceding insurer shall give written notice of the pendency of a claim against the insolvent ceding insurer on the policy or contract reinsured within a reasonable time after such claim is filed in the insolvency proceeding and during the pendency of such claim the assuming insurer may investigate such claim and interpose, at its own expense, in the proceedings where such claim is to be adjudicated any defense or defenses which it may deem available to the ceding company or its liquidator or receiver or statutory successor. Subject to court approval, the expense thus incurred by the assuming insurer shall

be chargeable, against the insolvent ceding insurer as part of the expense of liquidation, to the extent of a proportionate share of the benefit which may accrue to the ceding insurer solely as a result of the defense undertaken by the assuming insurer.

(5) The commissioner may in accordance with the provisions of chapter thirty A, after notice and hearing, promulgate reasonable rules and regulations necessary to effectuate the provisions of this section, but such regulations shall not enlarge upon or extend the provisions of this section.

Similar authority:

Ark. Code Ann. § 23-62-204 & 23-62-303 (1987).
Colo. Rev. Stat. § 10-3-118 (1994 & Supp. 1995).
Conn. Gen. Stat. Ann. § 38a-85 & -86 (West 1992 & Supp. 1995).
Del. Code Ann. tit. 18, §§ 911 & 1105 (1989 & Supp. 1995).
Fla. Stat. Ann. § 624.610 (2) (West Supp. 1995).
Ga. Code Ann. § 33-7-14 (Supp. 1995).
Haw. Rev. Stat. §§ 431:4A-101 & -102 (1993 & Supp. 1995).
Idaho Code §§ 41-514 & -604 (1991 & Supp. 1995).
Ill. Stat. Ann. ch. 215, §§ 5/173.1 & .2 (1993 & supp. 1995).
Kan. Stat. Ann. § 40-212 (1993).
Ky. Rev. Stat. Ann. § 304.5-140 (Baldwin Supp. 1995).
La. Rev. Stat. Ann. §§ 941 - 941.3 (West 1995).
Me. Rev. Stat. Ann. tit. 24-A, §§ 731, 731-B & 922 (West 1990 & Supp. 1995).
Md. Ins. Code Ann. § 74 (2) (1994).
Mich. Stat. Ann. § 24.1725 (Callaghan Supp. 1995).
Minn. Stat. Ann. § 60A.092 & 60A.093 (West Supp. 1995).
Mich. Stat. Ann. § 24.1725 (Callaghan Supp. 1995).
Mont. Code Ann. §§ 33-2-1216 & 1217 (1995).
Neb. Rev. Stat. § 44-416.01 (Supp. 1995).
Nev. Rev. Stat. § 681A.110.2 (1991).
N.M. Stat. Ann. §§ 59A-7-11(B) & 59A-8-3 (1991).
N.Y. Ins. Law § 1308 (McKinney 1985 & Supp. 1995).
N.C. Gen. Stat. §§ 58-7-21 & 58-7-26 (1994).

N.D. Cent. Code §§ 26.1-31.2-.01 & 26.1-31.2-.02 (1995).
Okla. Stat. Ann. tit. 36, § 711 (West Supp. 1995).
Or. Rev. Stat. §§ 731.508 - .510, 733.040 & 733.140 (1993).
R.I. Gen. Laws § 27-1.1-1 & 27-1.1-2 (1994).
S.C. Code Ann. §§ 38-9-200 & -210 (Law. Co-op. Supp. 1995).
S.D. Codified Laws Ann. §§ 58-14-4, & 56-14-14 to -16 (1990).
Tenn. Code Ann. § 56-2-208 (1994).
Utah Code Ann. § 31A-17-404 (1994).
Vt. Stat. Ann. tit. 8, § 3634a(b) (Supp. 1995).
Va. Code Ann. § 38.2-1316.2-.4 (1994 & Supp. 1995).
W. Va. Code § 33-4-15a (Supp. 1995).
Wash. Rev. Stat. Ann. § 48.12.160 (West Supp. 1995).

III. Reinsurance affects the amount of reserves or surplus required.

Wyo. Stat. Ann. § 26-6-104 (1993).

(a) As to property, casualty and surety insurance the insurer shall maintain an unearned premium reserve on all policies in force.

(b) [T]he unearned premium reserve shall not be less than that computed, after deduction of applicable reinsurance in solvent insurers, as fifty percent (50%) of the gross premium for the current policy year plus one hundred percent (100%) of gross premiums paid in advance as to subsequent policy years.

Similar authority:

Ala. Code § 27-36-3 (b) (1986).
Alaska Stat. § 21.18.060(b) (Supp. 1995).
Ariz. Rev. Stat. Ann. § 20-506(B) 1990).
Ark. Code Ann. § 23-62-605(b)(1) (1987).
Del. Code Ann. tit. 18, § 1106(b) (1989).
Fla. Stat. Ann. § 625.051(2) (West 1984).
Ga. Code An. § 33-10-6(b) (Michie 1992).
Haw. Rev. Stat. § 431:5-301(b) (1993).

Idaho Code § 41-606(2) (1991).
Iowa Code Ann. § 515.47 (West 1988).
Ky. Rev. Stat. Ann. § 304.6-050(2) (Baldwin 1988).
La. Rev. Stat. Ann. § 891 (West 1995).
Me. Rev. Stat. Ann. tit. 24-A, § 923.2 (West 1990).
Md. Ins. Code Ann. § 78 (2) (1994).
Mont. Code Ann. § 33-2-512 (1995).
Nev. Rev. Stat. § 681B.060 (2) (1991).
N.Y. Ins. Law § 1305 (b) (McKinney 1985).
N.C. Gen. Stat. § 58-3-71 (b)-(d) & 58-3-81 (a) (1994).
Okla. Stat. Ann. tit. 36, § 1505.B (West 1990).
S.C. Code Ann. § 38-9-190 (Law. Co-op. Supp. 1995).
S.D. Codified Laws Ann. § 58-26-37 (1990).
Va. Code Ann. § 38.2-1316.6 (1994).
W. Va. Code § 33-7-6(b) (1992).
Wyo. Stat. § 26-6-105(b) (1993).

IV. Legislative finding re: regulation of insolvency process

Tenn. Code Ann. § 56-9-101(d)(6) & (7) (1994).

(d) The purpose of this chapter is the protection of the interests of insureds, claimants, creditors and the public generally, with minimum interference with the normal prerogatives of owners and managers of insurers, through:

...

(6) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business; and

(7) Providing for a comprehensive scheme for the rehabilitation and liquidation of insurance companies and those subject to this chapter as part of the regulation of the business of insurance, insurance industry and insurers in this state. Proceedings in cases of insurer insolvency and delin-

quency are deemed an integral aspect of the business of insurance and are of vital public interest and concern.

Mo. Rev. Stat. § 375.1176.1 (1994).

... The liquidation of any insurer shall be considered to be the business of insurance for the purposes of application of any law of this state.

Similar authority:

Colo. Rev. Stat. § 10-3-501(3)(f)&(g) & 501(4) (1994).
Conn. Gen. Stat. Ann. § 38a-903(6)&(7) (West 1992 & Supp. 1995).
Ga. Code Ann. § 33-37-1(6)&(7) (Supp. 1995).
Haw. Rev. Stat. § 431:15-101(6) (1993).
Idaho Code § 41-3301(4)(f) (1991).
Iowa Code Ann. § 507c.1(4)(f) & (g) (West 1988 & Supp. 1995).
Ky. Rev. Stat. Ann. § 304.33-010(4)(f) & (g) (Baldwin Supp. 1995).
Mich. Stat. Ann. § 24.18101 (3)(f) (1994).
Minn. Stat. Ann. § 60B.01 (4)(f) (West 1986).
Miss. Code Ann. § 83-24-3 (f) & (g) (1991).
Mont. Code Ann. § 33-2-1302 (3)(f) (1995).
Neb. Rev. Stat. § 44-4801 (6)&(7) (1993).
N.H. Rev. Stat. Ann. § 402-C:1 (IV)(f) (1983).
N.C. Gen. Stat. § 58-30-1 (c)(6) (1994).
N.D. Cent. Code § 26.1-06.1-01.3 (f)&(g) (1995).
Ohio Rev. Code Ann. § 3903.02 (D)(6) (Anderson 1989).
40 Pa. Cons. Stat. Ann. § 221.1 (c)(vi) (1992).
Wis. Stat. Ann. § 645.01(4)(f) (West 1995).

V. Action for appointment of receiver to be initiated by commissioner.

Mo. Rev. Stat. § 375.1154.1 (1994).

No delinquency proceeding shall be commenced after August 28, 1991, by anyone other than the director [of the Department of Insurance] and no court shall have jurisdiction to

entertain, hear or determine any proceedings commenced by any other person.

Mass. Gen. L. ch. 175, § 180C (Supp. 1995).

If the commissioner deems that a domestic company which is the subject of a rehabilitation proceeding under section one hundred and eighty B, or which may properly be the subject of such a proceeding for any cause referred to in said section, hereinafter referred to as the company, is insolvent and that it should be liquidated, he shall make application to the court for a decree authorizing him to liquidate the company.

Similar authority:

Ala. Code § 27-32-4 (1986).
Alaska Stat. § 21.78.020(a) (1993).
Ariz. Rev. Stat. Ann. § 20-613(A) (Supp. 1995).
Ark. Code Ann. § 23-68-104 (1987).
Colo. Rev. Stat. § 10-3-504(1) (1994).
Conn. Gen. Stat. Ann. § 38a-906(a) (West 1992).
Dela. Code Ann. tit. 18, § 5903 (1989).
Fla. Stat. Ann. § 631.031 (West Supp. 1995).
Ga. Code Ann. § 33-37-4(a) (Michie Supp. 1995).
Idaho Code § 41-3304(1) (1991).
Ind. Code Ann. §§ 27-2-4-1 & 27-9-1-3(a) (Burns 1994).
Iowa Code Ann. § 507C.4(1) (West 1988).
Kan. Stat. Ann. § 40-3608(a) (1993).
La. Rev. Stat. Ann. § 742 (West 1995).
Me. Rev. Stat. Ann. tit. 24-A, § 4354.1 & 4360 (West Supp. 1995).
Md. Ann. Code art. 48A, § 134 (1994).
Mich. Stat. Ann. § 24-18104 (1) (Callaghan 1994).
Miss. Code Ann. § 83-24-9 (1) (1991).
Mont. Code Ann. § 33-2-1305 (1) (1995).
Neb. Rev. Stat. § 44-4804 (1) (1993).
N.J. Stat. Ann. § 17:30C-4 (a) (West 1994).
N.M. Stat. Ann. § 59A-41-34 (A) (1991).

N.Y. Ins. Law § 7417 (McKinney 1985).
N.C. Gen. Stat. § 58-30-15 (a) (1994).
N.M. Cent. Code § 26.1-06.1-04.1 (1995).
Ohio Rev. Code Ann. § 3903.04 (A) (Anderson 1989).
Okla. Stat. Ann. tit. 36, § 1903 (West 1990).
Or. Rev. Stat. § 734.130 (1) (1993).
40 Pa. Cons. Stat. Ann. § 221.20 (a) (1993).
R.I. Gen. Laws § 27-14.3-4 (a) (1994).
S.D. Codified Laws Ann. § 58-29B-4 (1990).
Tenn. Code Ann. § 56-9-104(a) (1994).
Wash. Rev. Stat. Ann. § 48.31.190(2) (West Supp. 1995).
Wis. Stat. Ann. § 645.04(1) (West 1995).
Wyo. Stat. § 26-28-103 (1993).

VI. Commissioner and limited number of creditors can petition for liquidation.

Utah Code Ann. § 31A-27-103

(1) Except as provided in Subsection (2), no delinquency proceeding may be commenced under this chapter by anyone other than the Utah commissioner.

(2) (a) Three or more judgment creditor's holding unrelated judgments against an insurer, which judgments aggregate more than \$5,000 in excess of any security held by those creditors may commence proceedings against the insurer under the conditions and in the manner prescribed in this subsection, by serving notice upon the commissioner and the insurer of an intention to file a petition for liquidation under Section 31A-27-307 or 31A-27-402. Each of the judgments:

(i) shall have been rendered against the insurer by a Utah court having jurisdiction over the subject matter and the insurer;

(ii) shall have been entered more than 60 days before the service of notice under Subsection (2);

(iii) may not have been satisfied in full;

(iv) may not be the subject of a valid contract between the insurer and any judgment creditor for payment of this judgment, unless that contract has been breached by the insurer;

(v) may not be a judgment assigned in order to institute proceedings under this subsection; and

(vi) may not be a judgment on which an appeal or review is pending or may yet be brought.

(b) If any one of the judgments in favor of a petitioning creditor remains unpaid for 30 days after service of the notice under Subsection (2), and the commissioner has then filed a petition for liquidation, the creditor may file a verified petition for liquidation of the insurer in the manner prescribed by Section 31A-27-307 or 31A-27-402, alleging the conditions stated in this subsection. The commissioner shall be served and joined in the action.

Similar authority:

Haw. Rev. Stat. § 431:15-104(a)&(b) (1993).
Ill. Rev. Stat. ch. 215, para. 5 § 201 (1993).
Ky. Rev. Stat. Ann. § 304.33-040(1)&(2) Baldwin Supp. 1995).
Minn. Stat. Ann. § 60B.04 (1)& (2) (West 1986).
Nev. Rev. Stat. §§ 696B.250 & 696B.350 (1991).
N.H. Rev. Stat. Ann. § 402-C:4 (I)&(II) (1983).
S.C. Code Ann. § 38-27-60(a) (Law. Co-op. Supp. 1995).
Utah Code Ann. § 31A-27-103(1) & (2) (1994).
Va. Code Ann. § 38.2-1504 (1994).

VII. Liquidation under chapter the sole and exclusive remedy.

Mo. Rev. Stat. § 375.1154.2 (1994).

No court of this state shall have jurisdiction to entertain, hear or determine any complaint praying for the dissolution, liquidation, rehabilitation, sequestration, supervision, conservation or receivership of any insurer; or praying for an injunction or restraining order or other relief preliminary to, incidental to or relating to such proceedings other than in accordance with sections 375.1150 to 375.1246 [Insurers Supervision, Rehabilitation and Liquidation Act.]

Similar authority:

Ala. Code § 27-32-3 (1986).
Alaska stat. § 21.78.010(b) (1993).
Ariz. Rev. Stat. Ann. § 20-612(c) (Supp. 1995).
Ark. Code Ann. § 23-68-103(c) (1987).
Conn. Gen. Stat. Ann. § 38a-906(b) (West 1992).
Dela. Code Ann. tit. 18, § 5902(d) (1989).
Fla. Stat. Ann. § 631.021(3) (West Supp. 1995).
Ga. Code Ann. § 33-37-4 (Michie Supp. 1995).
Haw. Rev. Stat. 431:15-104(c) (1993).
Idaho Code § 41-3304(2) (1991).
Ind. Code Ann. § 27-9-1-3(b) (1994).
Iowa Code Ann. § 507C.4(2) (West 1994).
Kan. Stat. Ann. § 40-3608(6) (1993).
Ky. Rev. Stat. § 304.33-040(3) (Baldwin Supp. 1995).
Me. Rev. Stat. Ann. tit. 24-A, § 4354.4 (West 1990).
Md. Ann. Code art. 48A, § 133 (c) (1994).
Mich. Stat. Ann. § 24-18104 (2) (Callaghan 1994).
Minn. Stat. Ann. § 60B.04 (3) (West 1986).
Miss. Code Ann. § 83-24-9 (2) (1991).
Mont. Code Ann. § 33-2-1305 (2) (1995).
Neb. Rev. Stat. § 44-4804 (2) (1993).

Nev. Rev. Stat. § 696B.190 (4) (1991).
N.H. Rev. Stat. Ann. § 402-C:4 (III) (1983).
N.J. Stat. Ann. § 17:30C-3 (West 1994).
N.C. Gen. Stat. § 58-30-15 (b) (1994).
N.D. Cent. Code § 26.1-06.1-04.2 (1995).
Ohio Rev. Code Ann. § 3903.04 (B) (Anderson 1989).
Okla. Stat. Ann. tit. 36, § 1902.C (West 1990).
Or. Rev. Stat. § 734.120 (1) (1993).
40 Pa. Cons. Stat. Ann. § 221.4 (a) (1993).
R.I. Gen. Laws § 27-14.3-4 (a)&(b) (1994).
S.C. Code Ann. § 38-27-60(b) (Law. Co-op. Supp. 1995).
S.D. Codified Laws Ann. § 58-29B-4 (1990).
Tenn. Code Ann. § 56-9-104(b) (1994).
Utah Code Ann. § 31A-27-103(3) (1994).
Vt. Stat. Ann. § 7032 (1993).
W. Va. Code § 33-10-2 (1992).
Wis. Stat. Ann. § 645.04(3) (West 1995).
Wyo. Stat. § 26-28-102(d) (1993).

VIII. Personal jurisdiction over reinsurer.

Mo. Rev. Stat. § 375.1154 (1994).

4. In addition to other grounds for jurisdiction provided by the law of this state, a court having jurisdiction of the subject matter has jurisdiction over a person served pursuant to applicable laws or supreme court rule in an action brought by the receiver of a domestic insurer or an alien insurer domiciled in this state:

...

(b) If the person is a reinsurer who has at any time entered into a contract of reinsurance with an insurer against which a delinquency proceeding has been instituted, or is an agent or broker of or for the reinsurer, in any action on or incident to the reinsurance contract[.]

Similar authority:

Alaska Stat. § 21.78.020(d)(2) (1993).
Colo. Rev. Stat. Ann. § 10-3-504(3)(b) (1994).
Conn. Gen. Stat. Ann. § 38a-906(c)(2) (1992).
Ga. Code Ann. § 33-37-4(c)(2) Michie Supp. 1995).
Haw. Rev. Stat. § 431:15-104(e)(2) (1993).
Idaho Code § 41-3304(3)(b) (1991).
Ind. Stat. Ann. § 27-9-1-3(c)(2) (Burns 1994).
Iowa Code Ann. § 507C.4(3)(b) (West Supp. 1995).
Kan. Stat. Ann. § 40-3608(c)(2) (1993).
Ky. Rev. Stat. § 304.33-040(5)(b) (Baldwin Supp. 1995).
Me. Rev. Stat. Ann. tit. 24-A, § 4355.1.B (West Supp. 1995).
Md. Ann. Code art. 48A, § 133 (e)(2) (1994).
Mich. Stat. Ann. § 24.18104 (3)(b) (Callaghan 1994).
Minn. Stat. Ann. § 60B.04 (5)(b) (West 1986).
Miss. Code Ann. § 83-24-9 (3)(b) (1991).
Mont. Code Ann. § 33-2-1306 (2) (1995).
Neb. Rev. Stat. § 44-4804 (3)(b) (1993).
Nev. Rev. Stat. § 696B.200 (1)(b) (1991).
N.H. Rev. Stat. Ann. § 402-C:4 (V)(b) (Supp. 1994).
N.C. Gen. Stat. § 58-30-15 (c)(2) (1994).
N.D. Cent. Code § 26.1-06.1-04.3 (b) (1995).
Ohio Rev. Code Ann. § 3903.04 (C)(2) (Anderson 1989).
40 Pa. Cons. Stat. Ann. § 221.4 (b)(ii) (1993).
R.I. Gen. Laws § 27-14.3-4 (c)(2) (1994).
S.C. Code Ann. § 38-27-60(d)(2) (Law. Co-op. Supp. 1995).
S.D. Codified Laws Ann. § 58-29B-6(2) (Supp. 1995).
Tenn. Code Ann. § 56-9-104(c) (1994).
Utah Code Ann. § 31A-27-103(5)(b) (1994).

IX. Grounds for liquidation.

Mass. Gen. L. ch. 175, § 6 (1987).

If [the commissioner of insurance] is satisfied that any domestic company is insolvent or in an unsound financial

condition, or that its business policies or methods are unsound or improper, or that its condition or management is such as to render its further transaction of business hazardous to the public or to its policyholders or creditors, or that it is transacting business fraudulently or that its officers or agents have refused to submit to an examination under section four or seventy-three, or that it has attempted or is attempting to compromise with its creditors on the ground that it is unable to pay its claims in full, or that, when its assets are less than its liabilities, inclusive of unearned premium but exclusive of capital, if any, it has attempted or is attempting to the disadvantage of policyholders who have suffered losses to prefer, or has preferred, by reinsurance, policyholders who have sustained no losses, he shall, except as provided in section one hundred and eighty B or one hundred and eighty C, or, if he is satisfied that any domestic insurer has exceeded its powers or has violated any provision of law, or that the amount of its funds, insurance in force or premiums or number of risks is deficient or that its guarantee capital under section ninety B or ninety-three or its guarantee fund under section ninety C is impaired, as set forth in sections twenty-three, seventy-four, ninety-three D and one hundred and sixteen, he may, apply to the supreme judicial court for an injunction restraining it in whole or in part from further proceeding with its business and for the appointment of a receiver.

Mo. Rev. Stat. § 375.1175 (1994).

The director may petition the court for an order directing him to liquidate a domestic insurer or an alien insurer domiciled in this state on the basis:

(1) Of any ground for an order of rehabilitation as specified in section 375.1165, whether or not there has been a prior order directing the rehabilitation of the insurer;

(2) That the insurer is insolvent;

(3) That the insurer is in such condition that the further transaction of business would be hazardous, financially or otherwise, to its policyholders, its creditors or the public;

(4) That the insurer is found to be in such condition after examination that it could not meet the requirements for incorporation and authorization specified in the law under which it was incorporated or is doing business; or

(5) That the insurer has ceased to transact the business of insurance for a period of one year.

Mo. Rev. Stat. § 375.1165 (1994).

The director may apply by petition to the court for an order authorizing him to rehabilitate a domestic insurer or an alien insurer domiciled in this state on any one or more of the following grounds:

(1) The insurer is in such condition that the further transaction of business would be hazardous financially to its policyholders, creditors or the public;

(2) There is reasonable cause to believe that there has been embezzlement from the insurer, wrongful sequestration or diversion of the insurer's assets, forgery or fraud affecting the insurer, or other illegal conduct in, by, or with respect to the insurer that if established would endanger assets in an amount threatening the solvency of the insurer;

(3) The insurer has failed to remove any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, employee, or other person, if the person has been found after notice and hearing by the director to be dishonest or untrustworthy in a way affecting the insurer's business;

(4) Control of the insurer, whether by stock ownership or otherwise, and whether direct or indirect, is in a person or persons found after notice and a hearing to be untrustworthy;

(5) Any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, employee, or other person, has refused to be examined under oath by the director concerning its affairs, whether in this state or elsewhere; and after reasonable notice of this fact, the insurer has failed promptly and effectively to terminate the employment and status of the person and all his influence on management;

(6) After request by the director pursuant to section 374.190, RSMo, or pursuant to the provisions of sections 375.1150 to 375.1246, the insurer has failed to promptly make available for examination any of its own property, books, accounts, documents or other records, or those of any subsidiary or related company within the control of the insurer, or those of any person having executive authority in the insurer so far as they pertain to the insurer;

(7) Without first obtaining the written consent of the director, the insurer has transferred, or attempted to transfer in a manner contrary to section 375.241 or sections 382.040 to 382.060, RSMo, substantially its entire property or business, or has entered into any transaction the effect of which is to merge, consolidate or reinsure substantially its entire property or business in or with the property or business of another;

(8) The insurer or its property has been or is the subject of an application for the appointment of a receiver, trustee, custodian, conservator or sequestrator or similar fiduciary of the insurer or its property otherwise than as provided under the insurance laws of this state, or such appointment has been made or is imminent;

(9) Within the three previous years the insurer has willfully violated its charter or articles of incorporation, its bylaws, any insurance law of this state, or any valid order of the director under section 375.1160 or 375.1162;

(10) The insurer has failed to pay within sixty days after due date any obligation to any state or subdivision thereof of any judgment entered in any state, if the court in which such judgment was entered had jurisdiction over such subject matter except that such nonpayment shall not be a ground until sixty days after any good faith effort by the insurer to contest the obligation has been terminated, whether it is before the director or in the courts, or the insurer has systematically attempted to compromise or renegotiate previously agreed settlements with its creditors on the ground that it is financially unable to pay its obligation in full;

(11) The insurer has failed to file its annual report or other financial report required by law within the time allowed by law;

(12) The board of directors or the holders of a majority of the shares entitled to vote, or a majority of those individuals entitled to the control of the insurer request or consent to rehabilitation under sections 375.1150 to 375.1246.

Similar authority:

Ala. Code § 27-32-7 (1986).
Alaska Stat. § 21.78.050 (1993).
Ariz. Rev. Stat. Ann. § 20-616 (1990).
Ark. Code Ann. § 23-68-107 (1987).
Colo. Rev. Stat. Ann. §§ 10-3-516 & 10-3-511 (Michie 1994).
Conn. Gen. Stat. Ann. §§ 38a-919 (West 1992).
Del. Code Ann. tit. 18, § 5906 (1989).
Fla. Stat. Ann. § 631.061 (West Supp. 1995).
Ga. Code Ann. §§ 33-37-16 & 33-37-11 (Supp. 1995).
Haw. Rev. Stat. §§ 431:15-306 & 431:15-301 (1993).
Idaho Code §§ 41-3317 & 41-3312 (1991).
Ill. Rev. Stat. ch. 215, para. 5, § 188 (Supp. 1995).
Ind. Stat. Ann. §§ 27-9-3-6 & 27-9-3-1 (Burns 1994).
Iowa Code Ann. §§ 507C.17 & 507C.12 (West 1988).
Kan. Stat. Ann. § 40-3621 & 40-3616 (1993).

Ky. Rev. Stat. § 304.33-190 (Baldwin Supp. 1995).
Me. Rev. Stat. Ann. tit. 24-A, § 4357.2 (West 1990).
Md. Ann. Code art. 48A, §§ 137 & 136 (1994).
Mich. Stat. Ann. §§ 24.18117 & 24.18112 (Callaghan 1994).
Minn. Stat. Ann. §§ 60B.20 & 60B.15 (West Supp. 1995).
Miss. Code Ann. §§ 83-24-33 & 83-24-23 (1991).
Mont. Code Ann. §§ 33-2-1341 & 33-2-1331 (1995).
Neb. Rev. Stat. §§ 44-4817 & 44-4812 (1993).
Nev. Rev. Stat. § 696B.220 (1991).
N.H. Rev. Stat. Ann. §§ 402-C:20 & 402-C:15 (1983).
N.J. Stat. Ann. § 17:30C-8 (West 1994).
N.M. Stat. Ann. § 59A-41-28 (1991).
N.Y. Ins. Law § 7404 & 7402 (McKinney 1985 & Supp. 1995).
N.C. Gen. Stat. §§ 58-30-100 & 58-30-75 (1994).
N.D. Cent. Code § 26.1-06.1-16 & 26.1-06.1-11 (1995).
Ohio Rev. Code Ann. §§ 3903.17 & 3903.12 (Anderson 1989).
Okla. Stat. Ann. tit. 36, §§ 1906 & 1905 (West 1990).
Or. Rev. Stat. §§ 734.170 & 734.150 (1993).
40 Pa. Cons. Stat. Ann. § 221.19 & 221.14 (1993).
R.I. Gen. Laws §§ 27-14.3-21 & 27-14.3-16 (1994).
Utah Code Ann. § 31A-27-307 (1994).
Va. Code § 38.2-1503 (1994).
W. Va. Code § 33-10-6 (1992).
Wis. Stat. Ann. § 645.41 (West 1995).
Wyo. Stat. § 26-28-105 & 26-28-106 (1993).

X. Commissioner shall be appointed receiver/liquidator.

Mass. Gen. L. ch. 175, § 180C (Supp. 1995).

If the commissioner deems that a domestic company which is the subject of a rehabilitation proceeding under section one hundred and eighty B, or which may properly be the subject of such a proceeding for any cause referred to in said section, hereinafter referred to as the company, is insolvent and that it should be liquidated, he shall make application to the court for a decree authorizing him to liquidate the company. The court,

after notice to all known creditors and stockholders of the company and a full hearing, may order its liquidation and appoint the commissioner permanent receiver thereof.

Mo. Rev. Stat. § 375.1176 (1994).

.1. An order to liquidate the business of a domestic insurer shall appoint the director and his successors as liquidator and shall direct the liquidator forthwith to take immediate possession of the assets of the insurer and to administer them subject to the supervision of the court until the liquidator is discharged by the court.

Similar authority:

Ala. Code § 27-32-15(a) (1986).
Alaska Stat. § 21.78.130(a) (Supp. 1995).
Ariz. Rev. Stat. Ann. § 20-624 (1990).
Ark. Code Ann. § 23-68-113(d) (1987).
Colo. Rev. Stat. Ann. § 10-3-517(1) (Michie 1994).
Conn. Gen. Stat. Ann. § 38a-920(a) (West 1992).
Del. Code Ann. tit. 18, § 5913 (1989).
Fla. Stat. Ann. § 631.141 (West 1989).
Ga. Code Ann. § 33-37-17(a) (Supp. 1995).
Haw. Rev. Stat. § 431:15-307(a) (1993).
Idaho Code §§ 41-3317 & 41-3318(1) (1991).
Ill. Rev. Stat. ch. 215, para. 5, § 190(5) (Supp. 1995).
Ind. Stat. Ann. § 27-9-3-7(a)(1) (Burns 1994).
Iowa Code Ann. § 507C.18(1) (West Supp. 1995).
Kan. Stat. Ann. § 40-3622 (1993).
Ky. Rev. Stat. § 304.33-200(1) (Baldwin Supp. 1995).
La. Rev. Stat. Ann. § 735.A (West 1995).
Me. Rev. Stat. Ann. tit. 24-A, § 4364.1 (West 1990).
Md. Ann. Code Art. 48A, § 141 (a)(1) (1994).
Mich. Stat. Ann. § 24.18118 (1) (Callaghan Supp. 1995).
Minn. Stat. Ann. § 60B.21 (1) (West 1986).
Miss. Code Ann. § 83-24-35 (1) (1991).

Mont. Code Ann. § 33-2-1342 (1) (1995).
Neb. Rev. Stat. § 44-4814 (1) (1993).
Nev. Rev. Stat. § 696B.290 (1) (1991).
Nev. Rev. Stat. § 696B.300 (1) (1991).
N.H. Rev. Stat. Ann. § 402-C:21 (I) (1983).
N.J. Stat. Ann. § 17:30C-15(a) (West 1994).
N.M. Stat. Ann. §§ 59A-41-18 (A) & 59A-41-30 (A) (1991).
N.Y. Ins. Law §§ 7405 & 7409 (b) (McKinney 1985).
N.C. Gen. Stat. § 58-30-105 (a) (1994).
N.D. Cent. Code § 26.1.06.1-17.1 (1995).
Ohio Rev. Code Ann. § 3903.18 (A) (Anderson 1989).
Okla. Stat. Ann. tit. 36, § 1914.A (West 1990).
Or. Rev. Stat. § 734.210 (1) (1993).
40 Pa. Cons. Stat. Ann. § 221.20(c) (1993).
R.I. Gen. Laws § 27-14.3-22 (a) (1994).
S.C. Code Ann. § 38-27-370(A) (Law. Co-op. Supp. 1995).
Tenn. Code Ann. § 56-9-307(a) (1994).
Tex. Ins. Code § 21.28(2)(a) (West Supp. 1995).
Utah Code Ann. § 31A-27-307 (1994).
Vt. Stat. Ann. tit. 8, § 7057 (1994).
Wash. Rev. Code Ann. § 48.99.020(1) (West Supp. 1995).
W. Va. Code § 33-10-14 (1992).
Wis. Stat. Ann. § 645.42 (1) (West 1995).
Wyo. Stat. § 26-28-112(a) (1993).

Contra Va. Code Ann. § 38.2-1508 (1994)(when Insurance Commission is appointed receiver it acts without supervision of court; if someone other than Commission is appointed it acts pursuant to a court ordered plan.)

XI. Liquidator to take control of property of insurer and begin to collect the assets

Mo. Rev. Stat. § 375.1146 (1994)

.1. An order to liquidate the business of a domestic insurer shall appoint the director and his successors as liquidator and

shall direct the liquidator forthwith to take immediate possession of the assets of the insurer and to administer them subject to the supervision of the court until the liquidator is discharged by the court. . . . The liquidator shall be vested by operation of law with the title to all of the property, contracts and rights of action, and all of the books and records of the insurer ordered liquidated, as of the entry of the order of liquidation.

Mo. Rev. Stat. § 375.1182 (1994)

1. The liquidator shall have the power:

...

(6) To collect all debts and moneys due and claims belonging to the insurer, wherever located[.]

Mass. Gen. L. ch. 175, § 180C (1987).

...

Upon the entry of a decree ordering liquidation of a company the receiver shall proceed forthwith to liquidate the business thereof[.]

Ala. Code §§ 27-32-12(a) & 14(b) (1986).

Alaska Stat. §§ 21.78.100(a) & 130(b) (1993 & Supp. 1995).

Ariz. Rev. Stat. Ann. §§ 20-621(a) & -624(B) (1990).

Ark. Code Ann. §§ 23-68-111(a)(1) & -113(2) (1987).

Colo. Rev. Stat. Ann. § 10-3-517(1) (Michie 1994).

Conn. Gen. Stat. Ann. § 38a-920(a) (West 1992).

Del. Code Ann. tit. 18, §§ 5911(a) & 5913(b) (1989).

Fla. Stat. Ann. §§ 631.111, .141(2) & .152(2) West 1984 & Supp. 1995).

Ga. Code Ann. § 33-37-20(8) (Supp. 1995).

Haw. Rev. Stat. § 431:15-307(a) & -310(a)(6) (1993).

Idaho Code §§ 41-3318(1) & -3319(1)(f) (1991).

Ill. Rev. Stat. ch. 215, para. 5, § 190(5) & 191 (1993 & Supp. 1995).

Ind. Stat. Ann. § 27-9-4-7(b) & -9(b)(6) (Burns 1994).

Iowa Code Ann. § 507C.18(1) & .21(f) (West 1988).

Kan. Stat. Ann. § 40-3622(a) & .3625(a)(8) (1993).

Ky. Rev. Stat. § 304.33-200 & 240(6) (Baldwin Supp. 1995).

La. Rev. Stat. Ann. § 737.A (West 1995).

Me. Rev. Stat. Ann. tit. 24-A, § 4364.2 (West 1990).

Md. Code Ann. art. 48A, §§ 141 (a)(2) & (b) & 142 (1994).

Mich. Stat. Ann. § 24.18118 (1) & .18121 (f) (Callaghan Supp. 1995).

Minn. Stat. Ann. § 60B.21 (1) & .25(6) (West 1986 & Supp. 1995).

Miss. Code Ann. § 83-24-35 (1) & -41(h) (1991).

Mont. Code Ann. § 33-2-1342 (1) & -1345(1)(f) (1995).

Neb. Rev. Stat. § 44-4818 (1) & -4821(1)(h) (1993).

Nev. Rev. Stat. § 696B.290 (2)&(5) & .300(2) (1991).

N.H. Rev. Stat. Ann. § 402-C:21(I) & -C:25(VI) (1983).

N.J. Stat. Ann. § 17:30C-15(a)&(b) (West 1994).

N.M. Stat. Ann. § 59A-41-18(B)&(C) & -30(A)&(B) (1991).

N.Y. Ins. Law § 7405(a)&(b) & 7409(a)&(b) (McKinney 1985).

N.C. Gen. Stat. § 58-30-105(a) & -120(6) (1994).

N.D. Cent. Code § 26.1-06.1-17.1 & -20.1(h) (1995).

Ohio Rev. Code Ann. § 3903.18(A) & 3903.21(A)(6) (Anderson 1989).

Okla. Stat. Ann. tit. 36, § 1911.A & 1914.A, .B & .E (West 1990).

Or. Rev. Stat. § 734.180(1), .210(1) & .220 (1993).

40 Pa. Cons. Stat. Ann. § 221.20(c) & .23(6) (1993).

R.I. Gen. Laws § 27.14.3-22(a) & -25(8) (1994).

S.C. Code Ann. §§ 38-27-370(A) & -400(6) (Law. Co-op. Supp. 1995).

S.D. Codified Laws Ann. § 58-29B-49(6) (Supp. 1995).

Tenn. Code Ann. §§ 56-9-307(a) & -310(8) (1994).

Utah Code Ann. §§ 31A-27-310 & -314(6) (1994).

Vt. Stat. Ann. tit. 8, § 7060 (9).

Wash. Rev. Code Ann. § 48.99.020(1) (West Supp. 1995).

W. Va. Code § 33-10-11 (1992).

Wis. Stat. Ann. §§ 645.42(1) & 645.46(6) (West 1995).

Wyo. Stat. §§ 26-28-110 & -112(a)&(b) (1993).

**XII. Liquidator may bring actions in other jurisdictions to
forestall garnishment or attachment.**

Mo. Rev. Stat. § 375.1182 (1994)

.1. The liquidator shall have the power:

...

(6) To collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose:

(a) to institute timely actions in other jurisdictions to forestall garnishment and attachment proceedings against such debt[.]

Similar authority:

Colo. Rev. Stat. Ann. § 10-3-520 (1)(h)(II) (Michie 1994).
Ga. Code Ann. § 33-37-20(8)(A) (Supp. 1995).
Haw. Rev. Stat. § 431:15-310(6)(A) (1993).
Idaho Code §§ 41-3321(1)(f)1 (1991).
Ind. Stat. Ann. § 27-9-3-9(b)(6)(A) (Burns 1994).
Iowa Code Ann. § 507C.21(f)(1) (West 1988).
Kan. Stat. Ann. § 40-3625(a)(8)(1) (1993).
Ky. Rev. Stat. § 304.33-240(6)) (Baldwin Supp. 1995).
Mich. Stat. Ann. § 24.18121 (f)(1) (Callaghan Supp. 1995).
Minn. Stat. Ann. § 60B.25(6) (West Supp. 1995).
Miss. Code Ann. § 83-24-41 (h)(1) (1991).
Mont. Code Ann. § 33-2-1345 (1)(f)(i) (1995).
Neb. Rev. Stat. § 44-4821 (1)(h)(i) (1993).
N.H. rev. Stat. Ann. § 402-C:25 (VI) (1983).
N.C. Gen. Stat. § 58-30-120 (6)(1) (1994).
N.D. Cent. Code § 26.1-06.1-20.1 (h)(1) (1995).
Ohio Rev. Code Ann. § 3903.21 (A)(6)(a) (Anderson 1989).
40 Pa. Cons. Stat. Ann. § 221.23 (6) (1993).
R.I. Gen. Laws § 27-14.3-25 (8)(i) (1994).
S.C. Code Ann. § 38-27-400(6)(a) (Law. Co-op. Supp. 1995).

S.D. Codified Laws Ann. § 58-29B-49(6) (Supp. 1995).
Tenn. Code Ann. § 56-9-310(8) (1994).
Utah Code Ann. § 31A-27-314 (6)(a) (1994).
Vt. Stat. Ann. tit. 8, § 7060(9) (1993).
Wis. Stat. Ann. § 645.46(6) (West 1995).

**XIII. Money can be borrowed by liquidator on pledge of
assets of the estate.**

Mo. Rev. Stat. § 375.1182 (1994)

.1. The liquidator shall have the power:

...

(10) To borrow money on the security of the insurer's assets or without security and to execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation. Any such funds borrowed may be repaid as an administrative expense and have priority over any other claims in class 1 under the priority of distribution[.]

Similar authority:

Ala. Code § 27-32-25 (1986).
Alaska Stat. § 21.78.230(a) (1993).
Ariz. Rev. Stat. Ann. § 20-634 (1990).
Ark. Code Ann. § 23-68-123(a) (1987).
Colo. Rev. Stat. Ann. § 10-3-520(1) (Michie 1994).
Conn. Gen. Stat. Ann. § 38a-923(10) (West Supp. 1995).
Del. Code Ann. tit. 18, § 5923 (1989).
Ga. Code Ann. § 33-37-20(a)(12) (Supp. 1995).
Haw. Rev. Stat. § 431:15-310(a)(10) (1993).
Idaho Code § 41-3321(1)(j) (1991).
Ill. Rev. Stat. ch. 215, para. 5, § 195 (1993).
Ind. Stat. Ann. § 27-9-3-9(b)(10) (Burns 1994).
Iowa Code Ann. § 507C.21(1)(j) (West Supp. 1995).
Kan. Stat. Ann. § 40-3625(a)(12) (1993).
Ky. Rev. Stat. § 304.33-240(11) (Baldwin Supp. 1995).

Me. Rev. Stat. Ann. tit. 24-A, § 4373 (West 1990).
Md. Ann. Code art. 48A, § 155 (1994).
Mich. Stat. Ann. § 24.18121 (j) (Callaghan Supp. 1995).
Minn. Stat. Ann. § 60B.25(10) (West Supp. 1995).
Miss. Code Ann. § 83-24-41 (l) (1991).
Mont. Code Ann. § 33-2-1345 (j) (1995).
Neb. Rev. Stat. § 44-4821 (1)(l) (1993).
Nev. Rev. Stat. § 696B.380 (1991).
N.H. Rev. Stat. Ann. § 402-C:25 (X) (1983).
N.J. Stat. Ann. § 17:30C-24 (West 1994).
N.M. Stat. Ann. § 59A-41-39 (1991).
N.Y. Ins. Law § 7429 (McKinney 1985).
N.C. Gen. Stat. § 58-30-120 (10) (1994).
N.D. Cent. Code § 26.1-06.1-20.1 (l) (1995).
Ohio Rev. Code Ann. § 3903.21 (A)(10) (Anderson 1989).
Okla. Stat. Ann. tit. 36, § 1924 (West 1990).
40 Pa. Cons. Stat. Ann. § 221.23 (10) (1993).
R.I. Gen. Laws § 27-14.3-25 (12) (1994).
S.C. Code Ann. § 38-27-400(10) (Law. Co-op. Supp. 1995).
S.D. Codified Laws Ann. § 58-29B-49(10) (Supp. 1995).
Tenn. Code Ann. § 56-9-310(12) (1994).
Utah Code Ann. § 31A-27-314 (10) (1994).
Vt. Stat. Ann. tit. 8, § 7060(11) (1993).
Va. Code Ann. § 38.2-1511 (1994).
W. Va. Code § 33-10-24 (1992).
Wis. Stat. Ann. § 645.46(10) (West 1995).
Wyo. Stat. § 26-28-122 (1993).

XIV. Liquidator can continue to prosecute or initiate any action by or against the insurer.

Mo. Rev. Stat. § 375.1182 (1994)

1. The liquidator shall have the power:

...

(12) To continue to prosecute and to institute in the name of the insurer or in his own name any and all suits and other legal proceedings, in this state or elsewhere, and, with the approval of the supervising court, to abandon the prosecution of claims that he deems unprofitable to pursue further[.]

Similar authority:

Colo. Rev. Stat. Ann. § 10-3-520(n) (Michie 1994).
Conn. Gen. Stat. Ann. § 38a-923(12) (West Supp. 1995).
Ga. Code Ann. § 33-37-20(a)(14) (Supp. 1995).
Haw. Rev. Stat. § 431:15-310(a)(12) (1993).
Idaho Code § 41-3321(1)(l) (1991).
Ind. Stat. Ann. § 27-9-3-9(b)(12) (Burns 1994).
Iowa Code Ann. § 507C.21(l) (West 1988).
Kan. Stat. Ann. § 40-3625(14) (1993).
Ky. Rev. Stat. § 304.33-240(13) (Baldwin Supp. 1995).
Mich. Stat. Ann. § 24.18121 (l) (Callaghan Supp. 1995).
Minn. Stat. Ann. § 60B.25(12)(West Supp. 1995).
Miss. Code § 83-24-41 (n) (1991).
Mont. Code Ann. § 33-2-1345 (l) (1995).
Neb. Rev. Stat. § 44-4821 (1)(n) (1993).
N.H. Rev. Stat. Ann. § 402-C:25 (XII) (1983).
N.C. Gen. Stat. § 58-30-120 (12) (1994).
N.D. Cent. Code § 26.1-06.1-20.1 (n) (1995).
Ohio Rev. Code Ann. § 3903.21 (A)(12) (Anderson 1989).
40 Pa. Cons. Stat. Ann. § 221.23 (12) (1993).
R.I. Gen. Laws § 27-14.3-25 (14) (1994).
S.C. Code Ann. § 38-27-400(12) (Law. Co-op. Supp. 1995).
S.D. Codified Laws Ann. § 58-29B-49(12) (Supp. 1995).
Tenn. Code Ann. § 56-9-310(14) (1994).
Utah Code Ann. § 31A-27-314 (12) (1994).
Vt. Stat. Ann. tit. 8, § 7060(13) (1993).
Wis. Stat. Ann. § 645.46(12) (West 1995).

XV. Liquidator can intervene in any suit which might lead to the appointment of a receiver or trustee.

Mo. Rev. Stat. § 375.1182 (1994)

.1. The liquidator shall have the power:

...

(20) To intervene in any proceeding wherever instituted that might lead to the appointment of a receiver or trustee, and to act as receiver or trustee whenever the appointment is offered[.]

Similar authority:

Alaska Stat. § 21.78.130(j)(3) (1993).
Colo. Rev. Stat. Ann. § 10-3-520(v) (Michie 1994).
Conn. Gen. Stat. Ann. § 38a-923(20) (West Supp. 1995).
Ga. Code Ann. § 33-37-20(a)(22) (Supp. 1995).
Haw. Rev. Stat. § 431:15-310(a)(20) (1993).
Idaho Code § 41-3321(1)(t) (1991).
Ind. Stat. Ann. § 27-9-3-9(b)(20) (Burns 1994).
Iowa Code Ann. § 507C.21(1)(t) (West Supp. 1995).
Kan. Stat. Ann. § 40-3625(a)(22) (1993).
Ky. Rev. Stat. § 304.33-240(20) (Baldwin Supp. 1995).
Mich. Stat. Ann. § 24.18121 (t) (Callaghan Supp. 1995).
Minn. Stat. Ann. § 60B.25(20) (West Supp. 1995).
Miss. Code Ann. § 83-24-41 (v) (1991).
Mont. Code Ann. § 33-2-1345 (t) (1995).
Neb. Rev. Stat. § 44-4821 (1)(v) (1993).
N.H. Rev. Stat. Ann. § 402-C:25 (XIX) (1983).
N.C. Gen. Stat. § 58-30-120 (20) (1994).
N.D. Cent. Code § 26.1-06.1-20.1 (v) (1995).
Ohio Rev. Code Ann. § 3903.21 (A)(20) (Anderson 1989).
40 Pa. Cons. Stat. Ann. § 221.23 (20) (1993).
R.I. Gen. Laws § 27-14.3-25 (22) (1994).
S.C. Code Ann. § 38-27-400(20) (Law. Co-op. Supp. 1995).

S.D. Codified Laws Ann. § 58-29B-49(20) (Supp. 1995).
Tenn. Code Ann. § 56-9-310(22) (1994).
Utah Code Ann. § 31A-27-314 (20) (1994).
Vt. Stat. Ann. tit. 8, § 7060(21) (1993).
Wis. Stat. Ann. § 645.46(20) (West 1995).

XVI. No further actions can be commenced or continued against insurer or liquidator following entry of order of liquidation.

Mo. Rev. Stat. § 375.1188 (1994).

.1. Upon issuance of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in this state, no action at law or equity or in arbitration shall be brought against the insurer or liquidator, whether in this state or elsewhere, nor shall any such existing actions be maintained or further presented after issuance of such order. The courts of this state shall give full faith and credit to injunctions against the liquidator or the company or the continuation of existing actions against the liquidator or company, when such injunctions are included in an order to liquidate an insurer issued pursuant to corresponding provisions in other states.

Similar authority:

Ala. Code § 27-32-21 (1986).
Alaska Stat. § 21.78.100(h) (1993).
Colo. Rev. Stat. Ann. § 10-3-523(1) (Michie 1994).
Conn. Gen. Stat. Ann. § 38a-926 (West 1992).
Fla. Stat. Ann. § 631.041(1) (West Supp. 1995).
Ga. Code Ann. § 33-37-23(a) (Supp. 1995).
Haw. Rev. Stat. § 431:15-313(a) (1993).
Idaho Code §§ 41-3324 (1991).
Ind. Stat. Ann. § 27-9-3-12(a) (Burns 1994).
Iowa Code Ann. § 507C.24(1) (West Supp. 1995).
Kan. Stat. Ann. § 40-3627(a) (1993).
Ky. Rev. Stat. § 304.33-270(1) (Baldwin Supp. 1995).

Mich. Stat. Ann. § 24.18124 (1) (Callaghan 1994).
Minn. Stat. Ann. § 60B.28 (1) (West 1986).
Miss. Code Ann. § 83-24-47 (1) (1991).
Mont. Code Ann. § 33-2-1348 (1) (1995).
Neb. Rev. Stat. § 44-4824 (1) (1993).
N.H. Rev. Stat. Ann. § 402-C:28 (I) (1983).
N.C. Gen. Stat. § 58-30-130 (a) (1994).
N.D. Cent. Code § 26.1-06.1-23.1 (1995).
Ohio Rev. Code Ann. § 3903.24 (A) (Anderson 1989).
40 Pa. Cons. Stat. Ann. § 221.26 (a) (1993).
R.I. Gen. Laws § 27-14.3-28 (a) (1994).
S.C. Code Ann. § 38-27-430(a) (Law. Co-op. 1985).
S.D. Codified Laws Ann. § 58-29B-55(1) (1990).
Tenn. Code Ann. § 56-9-313(a)(1) (1994).
Utah Code Ann. § 31A-27-317(1) (1994).
Wash. Rev. Code Ann. § 48.99.131(1) (West Supp. 1995).
Wis. Stat. Ann. § 645.49(1) (West 1995).

XVII. The liquidator can intervene in any pending suit outside of the state when liquidator determines it is in best interest of the estate to do so.

Mo. Rev. Stat. § 375.1188 (1994).

1. . . . Whenever, in the liquidator's judgment, protection of the estate of the insurer necessitates intervention in an action against the insurer that is pending outside this state, he may intervene in the action. The liquidator may defend any action in which he intervenes pursuant to this section at the expense of the estate of the insurer.

Similar authority:

Ala. Code § 27-32-21 (1986).
Alaska Stat. § 21.78.100(h) (1993).
Colo. Rev. Stat. Ann. § 10-3-523(1) (Michie 1994).
Conn. Gen. Stat. Ann. § 38a-926 (West 1992).
Fla. Stat. Ann. § 631.041(1) (West Supp. 1995).

Ga. Code Ann. § 33-37-23(a) (Supp. 1995).
Haw. Rev. Stat. § 431:15-31y3(a) (1993).
Idaho Code §§ 41-3324 (1991).
Ind. Stat. Ann. § 27-9-3-12(a) (Burns 1994).
Iowa Code Ann. § 507C.24(1) (West Supp. 1995).
Kan. Stat. Ann. § 40-3627(a) (1993).
Ky. Rev. Stat. § 304.33-270(1) (Baldwin Supp. 1995).
Mich. Stat. Ann. § 24.18124 (1) (Callaghan 1994).
Minn. Stat. Ann. § 60B.28 (1) (West 1986).
Miss. Code Ann. § 83-24-47 (1) (1991).
Mont. Code Ann. § 33-2-1348 (1) (1995).
Neb. Rev. Stat. § 44-4824 (1) (1993).
N.H. Rev. Stat. Ann. § 402-C:28 (I) (1983).
N.C. Gen. Stat. § 58-30-130 (a) (1994).
N.D. Cent. Code § 26.1-06.1-23.1 (1995).
Ohio Rev. Code Ann. § 3903.24 (A) (Anderson 1989).
40 Pa. Cons. Stat. Ann. § 221.26 (a) (1993).
R.I. Gen. Laws § 27-14.3-28 (a) (1994).
S.C. Code Ann. § 38-27-430(a) (Law. Co-op. 1985).
S.D. Codified Laws Ann. § 58-29B-55(1) (1990).
Tenn. Code Ann. § 56-9-313(a)(1) (1994).
Utah Code Ann. § 31A-27-317(1) (1994).
Wash. Rev. Code Ann. § 48.99.131(1) (West Supp. 1995).
Wis. Stat. Ann. § 645.49(1) (West 1995).

XVIII. Setoff of mutual debts

Mo. Rev. Stat. § 375.1198.

1. Mutual debts or mutual credits, whether arising out of one or more contracts, between the insurer and another person in connection with any action or proceeding under sections 375.1150 to 375.1246, sections 374.216 and 374.217, RSMo, and section 382.302, RSMo, shall be set off and the balance only shall be allowed or paid, except as provided in subsections 2, 3, 4, 5 and 6 of this section and section 375.1204.

2. No setoff shall be allowed in favor of any person where:

(1) The obligation of the insurer to the person would not as of the date of the filing of a petition for liquidation entitle the person to share as a claimant in the assets of the insurer;

(2) The obligation of the insurer to the person was purchased by or transferred to the person with a view to its being used as a setoff; or

(3) The obligation of the person is to pay an assessment levied against the members or subscribers of the insurer, or is to pay a balance upon a subscription to the capital stock of the insurer, or is in any other way in the nature of a capital contribution; or

(4) The obligation of the insurer is owed to an affiliate of such person or to any entity or association, rather than the person; or

(5) The obligation of the person is owed to an affiliate of the insurer or to any other entity or association, rather than the insurer; or

(6) The obligations between the person and the insurer arise from reinsurance relationships resulting in business which is both ceded to and assumed from the insurer.

3. As soon as practicable, the receiver shall provide persons who assumed business from the insurer as reinsurers with statements of account identifying debts which are currently due and payable to the insurer. Such persons may set off against such debts only mutual credits which are currently due and payable by the insurer to such persons for the period covered by the accounting statements.

4. A person who ceded business to the insurer may set off debts due the insurer against only those mutual credits which the

person has paid or which have been allowed in a delinquency proceeding.

5. Notwithstanding the foregoing, a setoff of sums due on obligations in the nature of those prescribed in subdivision (6) of subsection 2 of this section shall be allowed for those debts accruing from business written under reinsurance contracts which were entered into, renewed or extended with the express written approval of the director where Missouri is the state of domicile of the insolvent insurer and when in the judgment of the director such action is deemed necessary or advisable in order to prevent or mitigate a threatened impairment or insolvency of a domiciliary insurer, in connection with supervision or conservation proceedings pursuant to this act or otherwise in connection with the exercise of the director's regulatory responsibilities concerning a threatened impairment or insolvency without the institution of any delinquency proceedings.

6. The provisions of this section shall apply to all obligations incurred under contracts entered into, renewed, or extended on or after July 1, 1992, and to any existing contract with a termination date longer than one year from January 1, 1993, and shall supersede any contractual provisions which might be construed to enlarge the setoff rights of any person under any contract with the insurer; provided that the provisions of subdivision (6) of subsection 2 and subsections 3, 4 and 5 of this section shall not apply to insurers or reinsurers until such time that the director determines that substantially similar provisions are effective in a sufficient number of states so as not to place domestic insurers or reinsurers at a competitive disadvantage. The director shall promulgate a rule announcing any determination as is necessitated by this subsection.

Similar authority:

Ala. Code § 27-32-29 (1986).

Alaska Stat. § 21.78.270 (1993).

Ariz. Rev. Stat. Ann. § 20-638 (1990).
Ark. Code Ann. § 23-68-127 (1987).
Colo. Rev. Stat. Ann. § 10-3-529 (Michie 1994).
Conn. Gen. Stat. Ann. § 38a-932 (West 1992 & Supp. 1995).
Del. Code Ann. tit. 18, § 5927 (1989).
Fla. Stat. Ann. § 631.281 (West 1984).
Ga. Code Ann. § 33-37-29 (Supp. 1995).
Haw. Rev. Stat. § 431:15-319 (1993).
Idaho Code §§ 41-3330 (1991).
Ill. Rev. Stat. ch. 215, para. 5, § 206 (Supp. 1995).
Ind. Stat. Ann. § 27-9-3-28 (Burns Supp. 1995).
Iowa Code Ann. § 507C.30 (West 1988 & Supp. 1995).
Kan. Stat. Ann. § 40-3633 (1993).
Ky. Rev. Stat. § 304.33-330 (Baldwin 1988).
La. Rev. Stat. Ann. § 747 (West 1995).
Me. Rev. Stat. Ann. tit. 24-A, § 4381 (West 1991).
Md. ann. Code art. 48A, § 159 (1994).
Mich. Stat. Ann. § 24.18130 (Callaghan Supp. 1995).
Minn. Stat. Ann. § 60B.34 (West 1986).
Miss. Code Ann. § 83-24-59 (1991).
Mont. Code Ann. § 33-2-1359 (1995).
Neb. Rev. Stat. § 44-4830 (1993).
Nev. Rev. Stat. § 696B.440 (1991).
N.H. Rev. Stat. Ann. § 402-C:34 (1983).
N.J. Stat. Ann. § 17:30C-27 (West 1994).
N.M. Stat. Ann. § 59A-41-45 (1991).
N.Y. Ins. Law § 7427 (Mckinney 1985).
N.C. Gen. Stat. § 58-30-160 (1994).
N.D. Cent. Code § 26.1-06.1-29 (1995).
Ohio Rev. Code Ann. § 3903.30 (Anderson 1989).
Okla. Stat. Ann. tit. 36, § 1928 (West 1990).
Or. Rev. Stat. § 734.370 (1993).
40 Pa. Cons. Stat. Ann. § 221.32 (1993).
R.I. Gen. Laws § 27-14.3-34 (1994).
S.C. Code Ann. § 38-27-490 (Law. Co-op. 1985).

S.D. Codified Laws Ann. §§ 58-29B-86 & -87 (1990 & Supp. 1995).
Tenn. Code Ann. § 56-9-319 (1994).
Utah Code Ann. § 31A-27-323 (1994).
Vt. Stat. Ann. tit. 8, § 7069 (1993).
Va. Code § 38.2-1515 (1994).
Wash. Rev. Code Ann. § 48.31.135 (West Supp. 1995).
W. Va. Code § 33-10-28 (1992).
Wis. Stat. Ann. § 645.56 (West 1995).
Wyo. Stat. § 26-28-126 (1993).

XIX. Reinsurers liability not reduced because of delinquency proceedings.

Mo. Rev. Stat. § 375.1202 (1994).

The amount recoverable by the liquidator from reinsurers shall not be reduced as a result of the delinquency proceedings, regardless of any provision in the reinsurance contract or other agreement. Payment made directly to an insured or other creditor shall not diminish the reinsurer's obligation to the insurer's estate.

Similar authority:

Alaska Stat. § 21.78.272 (1993).
Colo. Rev. Stat. Ann. § 10-3-531 (Michie 1994).
Conn. Gen. Stat. Ann. § 38a-934 (West 1992).
Ga. Code Ann. § 33-37-31 (Supp. 1995).
Haw. Rev. Stat. § 431:15-321 (1993).
Idaho Code §§ 41-3332 (1991).
Ind. Stat. Ann. § 27-9-3-30 (Burns 1994).
Iowa Code Ann. § 507C.32 (West 1988).
Kan. Stat. Ann. § 40-3634 (1993).
Ky. Rev. Stat. § 304.33-350 (Baldwin 1988).
Mich. Stat. Ann. § 24.18132 (Callaghan 1994).
Minn. Stat. Ann. § 60B.36 (West 1986).
Miss. Code Ann. § 83-24-63 (1991).
Mont. Code Ann. § 33-2-1361 (1995).

Neb. Rev. Stat. § 44-4832 (1993).
N.H. Rev. Stat. Ann. § 402-C:36 (1983).
N.C. Gen. stat. § 58-30-170 (1994).
N.D. Cent. Code § 26.1-06.1-31 (1995).
Ohio Rev. Code Ann. § 3903.32 (Anderson 1989).
40 Pa. Cons. Stat. Ann. § 221.34 (1993).
R.I. Gen. Laws § 27-14.3-36 (1994).
S.D. Codified Laws Ann. § 58-29B-94 (1990).
Utah Code Ann. § 31A-27-326 (1994).
Vt. Stat. Ann. tit. 8, § 7071 (1993).
Wis. Stat. Ann. § 645.58 (West 1995).2

XX. Judgment entered after commencement of liquidation proceeding not to be considered as evidence of insurer's liability or the amount of damages.

Mo. Rev. Stat. § 375.1208 (1994).

.4. No judgment or order against an insured or the insurer entered after the date of filing of a successful petition for liquidation, and no judgment or order against an insured or the insurer entered at any time by default or by collusion need be considered as evidence of liability or of the amount of damages.

Similar authority:

Ala. Code § 27-32-30(c) (1986).
Alaska Stat. § 21.78.170(g) (1993).
Ariz. Rev. Stat. Ann. § 20-639(C) (1990).
Ark. Code Ann. § 23-68-128(c) (1987).
Colo. Rev. Stat. Ann. § 10-3-535(4) (Michie 1994).
Conn. Gen. Stat. Ann. § 38a-938(d) (West Supp. 1995).
Del. Code Ann. tit. 18, § 5928(c) (1989).
Fla. Stat. Ann. § 631.181(2)(d) (West Supp. 1995).
Ga. Code Ann. § 33-37-35(d) (Supp. 1995).
Haw. Rev. Stat. § 431:15-326(d) (1993).
Idaho Code §§ 41-3336(4) (1991).

Ill. Rev. Stat. ch. 215, para. 5, § 206 (Supp. 1995).
Ind. Stat. Ann. § 27-9-3-34(d) (Burns 1994).
Iowa Code Ann. § 507C.36(4) (West 1988).
Kan. Stat. Ann. § 40-3637(d) (1993).
Ky. Rev. Stat. § 304.33-370(3) (Baldwin 1988).
La. Rev. Stat. Ann. § 749.D(4) (West 1995).
Me. Rev. Stat. Ann. tit. 24-A, § 4378.3 (West 1990).
Md. Ann. Code art. 48A, § 160 (c) (1994).
Mich. Stat. Ann. § 24.18136 (4) (Callaghan 1994).
Minn. Stat. Ann. § 60B.38 (3) (West 1986).
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N.C. Gen. Stat. § 58-30-190 (d) (1994).
N.D. Cent. Code § 26.1-06.1-35.4 (1995).
Ohio Rev. Code Ann. § 3903.36 (D) (Anderson 1989).
Or. Rev. Stat. § 734.380(4) (1993).
40 Pa. Cons. Stat. Ann. § 221.38 (c) (1993).
R.I. Gen. Laws § 27-14.3-40 (d) (1994).
S.C. Code Ann. § 38-27-550(d) (Law. Co-op. 1985).
S.D. Codified Laws Ann. § 58-29B-110 (1990).
Tenn. Code Ann. § 56-9-324(d) (1994).
Utah Code Ann. § 31A-27-329 (1994).
Vt. Stat. Ann. tit. 8, § 7075 (1994).
W. Va. Code § 33-10-29 (1992).
Wyo. Stat. § 26-28-127 (1993).

XXI. Attachment and garnishment of assets of estate not allowed.

Mo. Rev. Stat. § 375.1244 (1994).

During the pendency in this or any other state of a liquidation proceeding, whether called by that name or not, no action or proceeding in the nature of an attachment, garnishment or levy

of execution shall be commenced or maintained in this state against the delinquent insurer or its assets.

Similar authority:

Ala. Code § 27-32-21 (1986).
Alaska Stat. § 21.78.190 (1993).
Ariz. Rev. Stat. Ann. § 20-630 (1990).
Ark. Code Ann. § 23-68-120 (1987).
Colo. Rev. Stat. Ann. § 10-3-556 (Michie 1994).
Del. Code Ann. tit. 18, § 5919 (1989).
Ga. Code Ann. § 33-37-56 (Supp. 1995).
Haw. Rev. Stat. § 431:15-408 (1993).
Idaho Code §§ 41-3357 (1991).
Ill. Rev. Stat. ch. 215, para. 5, § 221.9 (1993).
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Nev. Rev. Stat. § 696B.340 (1991).
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N.Y. Ins. Law § 7414 (McKinney 1985).
N.C. Gen. Stat. § 58-30-295 (1994).
N.D. Cent. Code § 26.1-06.1-56 (1995).
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Okla. Stat. Ann. tit. 36, § 1920 (West 1990).
Or. Rev. Stat. § 734.320 (1993).

40 Pa. Cons. Stat. Ann. § 2221.60 (1993).
R.I. Gen. Laws § 27-14.3-61 (1994).
S.D. Codified Laws § 58-29B-157 (1990).
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Tenn. Code Ann. § 56-9-408 (1994).
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W. Va. Code § 33-10-20 (1992).
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JAN 5 1996

No. 95-244

In The
Supreme Court of the United States

October Term, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE
COMPANY TRUST, MISSION NATIONAL INSURANCE
COMPANY TRUST, ENTERPRISE INSURANCE COMPANY
TRUST, HOLLAND-AMERICA INSURANCE COMPANY
TRUST AND MISSION REINSURANCE
CORPORATION TRUST,

v.

Petitioner,

ALLSTATE INSURANCE COMPANY,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF
INDEPENDENT INSURERS, THE AMERICAN
INSURANCE ASSOCIATION, THE AMERICAN COUNCIL
OF LIFE INSURANCE, THE HEALTH INSURANCE
ASSOCIATION OF AMERICA AND THE ASSOCIATION
OF CALIFORNIA INSURANCE COMPANIES AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENT,
ALLSTATE INSURANCE COMPANY

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	6
I. THE HISTORY, MECHANICS AND OPERATION OF INSURANCE COMPANY INSOLVENCY AND LIQUIDATION AND THE ROLE OF THE COMMISSIONER DEMONSTRATE THAT STATE COURT JURISDICTION IS NOT REQUIRED ...	6
A. The History of Insurance Company Insol- vency and Liquidation and the Commis- sioner's Role as Receiver Show that the Debt Collection Aspect of Liquidation does not Involve a Complex Regulatory Scheme	6
B. Liquidations are not Subject to Detailed Reg- ulation under the Insolvency Statutes	11
C. The Nature of Debt Collection in Liquidation and the Commissioner's Role Create a Need for Diversity Jurisdiction	14
II. THE RIGHT OF ACCESS TO THE FEDERAL COURTS UNDER DIVERSITY JURISDICTION IS AN IMPORTANT SAFEGUARD TO INSURERS IN CONTRACT ACTIONS BROUGHT BY STATE INSURANCE COMMISSIONERS IN THEIR ROLE AS LIQUIDATOR	18
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

<i>Atlantic & Pacific Insurance Co. v. Combined Insurance Co.</i> , 312 F.2d 513 (10th Cir. 1962).....	25
<i>Bennett v. Liberty National Fire Insurance Co.</i> , 968 F.2d 969 (9th Cir. 1992).....	24
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943) ...	15, 20, 23
<i>Corcoran v. National Union Fire Insurance Co.</i> , 143 A.D.2d 309, 532 N.Y.S.2d 376 (App. Div. 1st Dep't 1988).....	10, 14
<i>Grimes v. Crown Life Insurance Co.</i> , 857 F.2d 699 (10th Cir. 1988), cert. denied, 489 U.S. 1096 (1989)	25
<i>Grode v. Mutual Fire, Marine and Inland Insurance Co.</i> , 8 F.3d 953 (3d Cir. 1993).....	4, 24
<i>Martin v. Hunter's Lessee</i> , 14 U.S. (1 Wheat.) 304 (1816).....	19
<i>New Orleans Pub. Serv. Inc. v. New Orleans</i> , 491 U.S. 350 (1989).....	15, 20, 23, 24
<i>Pacific Mutual Life Insurance Co. v. Haslip</i> , 499 U.S. 1 (1991).....	22
<i>Prudential Reinsurance Co. v. Superior Court (Garamendi)</i> , 3 Cal. 4th 1118, 842 P.2d 48, 14 Cal. Rptr. 2d 749 (1992).....	13, 14
<i>Stamp v. Insurance Co. of North America</i> , 908 F.2d 1375 (7th Cir. 1990).....	25
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TABLE OF AUTHORITIES - Continued

Page

STATUTES

15 U.S.C. §§ 1011-1015.....	3, 24
Judiciary Act of 1789, ch. 20, § 11-12, 1 Stat. 73.....	19
Cal. Ins. Code § 1011.....	11, 12, 13
Cal. Ins. Code § 1016.....	11, 12
Cal. Ins. Code § 1035.....	16
Cal. Ins. Code § 1036.....	16
Cal. Ins. Code §§ 1037(b) and (f)	13
Cal. Ins. Code § 1057.....	12, 13
Cal. Ins. Code §§ 1063 - 1063.15	13
Cal. Ins. Code §§ 1064.1 - 1064.12.....	9
Cal. Ins. Code § 1064.2(b).....	9, 12, 13
Cal. Ins. Code § 1064.2(c).....	16
Cal. Ins. Code § 1064.3(b).....	9
Cal. Ins. Code § 1064.10	9
Laws of 1851, ch. 95, § 6 contained in Denio's & Tracy's Revised Statutes of the State of New York I:1288, § 30 (1852).....	7
Wisc. Stat. Ann. ch. 645 (West 1995)	8, 9
National Association of Insurance Commissioners Model Supervision, Rehabilitation and Liquidation Act.....	8, 9, 10, 11, 16
Uniform Insurers Liquidation Act, 13 Uniform Laws Annotated 321-53.....	7, 8, 9, 16

TABLE OF AUTHORITIES - Continued

Page

BOOKS AND ARTICLES

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TABLE OF AUTHORITIES - Continued

Page

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- Jack W. Traylor, *The Liquidation Process*, in *Law and Practice of Insurance Company Insolvency* 63 (American Bar Ass'n 1986)..... 11

TABLE OF AUTHORITIES - Continued

Page

MISCELLANEOUS

House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, <i>Failed Promises, Insurance Company Insolvencies</i> , 101st Cong. 2d sess. (1990)	17
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STATEMENT OF INTEREST

The National Association of Independent Insurers ("NAII"), the American Insurance Association ("AIA"), the American Council of Life Insurance ("ACLI"), the Health Insurance Association of America ("HIAA"), and the Association of California Insurance Companies ("ACIC") are non-profit national and state trade organizations representing insurance companies in every state and jurisdiction of the United States.¹ The companies they represent write the vast majority of property, casualty, health and life insurance in the United States. The *amici* have a vital interest in the fundamental issue raised by this action, namely, the right to litigate in federal court claims arising out of the contractual agreements between solvent insurers, which include the great majority of insurers throughout the country, and the tiny minority of insurers that are in liquidation and are represented in disputes by state insurance commissioners who seek to limit their obligations.

Because of the nature of the services they provide, the type of risks they assume, the potential for injuries, loss, disputes and controversy, and the vast array of contractual arrangements between policy holders, insurers and reinsurers, insurance companies and the insurance industry, either on behalf of their policy

¹ The parties' written consent to the filing of this brief is on file with the Clerk. Respondent Allstate Insurance Company is a member of NAII and ACIC. Allstate Life Insurance Company, which is wholly owned by Respondent, is a member of ACLI.

holders or on their own behalf, are predominant participants in and users of the civil court systems of the United States – both federal and state.

Free access to the courts of the states *and*, where appropriate, the federal courts, is a fundamental right of all citizens, but is of particular importance to the insurance industry, which must by virtue of its very purpose and existence make use of and be subject to the benefits, burdens and protections of the court system.

SUMMARY OF ARGUMENT

The insurance industry participates in a wide variety of state court proceedings involving private parties and, indeed, state regulators, which involve the ongoing activities and business of insurers. In such proceedings, the state courts may indeed be well equipped to address matters of state insurance regulation. However, where the commissioner as liquidator is doing no more than attempting to enforce, or in this case avoid, contractual obligations of a failed insurer that is no longer in business, state insurance regulation is not the paramount issue. Insurers from other states should be permitted to exercise their statutory right to seek the protection of a federal forum on the basis of diversity of citizenship for the resolution of such disputes.

The inherent fallacy in the submission of the Commissioner and his *amici*, who represent regulators and legislators from other states, is that they have characterized the matters at issue in this case as part of an inseparable and seamless insurance regulatory scheme

that only a "specialized" state court can resolve, and have depicted the Commissioner as an independent neutral regulator whose sole function is to represent the public interest.² The Commissioner and his *amici* have, moreover, invoked the principles of the McCarran-Ferguson Act³ to suggest that these issues are within the exclusive state regulatory *and* adjudicatory responsibility.

However, this is not a case where the matters at issue call for denial of access to the federal courts. This action is an attempt to collect money under a contract and is not an inseparable part of a regulatory scheme. No "specialized" state court exists that is uniquely equipped to determine this matter. The Commissioner is not acting as an independent neutral regulator, but as an adversary whose sole function is to collect money on behalf of the insolvent insurance company. This case can and should accordingly be resolved in the federal forum our system guarantees.

The parties and other *amici* have addressed at length the legal issues of appealability and abstention, as well as the nature of the reinsurance contracts, set off claims, and arbitration matters at issue here. The purpose of this brief, submitted on behalf of the insurance industry, is to

² See Brief of the Petitioner (the "Commissioner's Brief") at 3-8; Brief of Massachusetts and the Director of Insurance of the State of Missouri as *Amici Curiae* in support of Petitioner, Chuck Quackenbush, Insurance Commissioner of the State of California ("Massachusetts/Missouri Brief") at 12-13; Brief of the Council of State Governments et al., as *Amici Curiae* in support of the Petitioner at 21-22.

³ 15 U.S.C. §§ 1011-1015.

address two fundamental issues relevant to these proceedings and to the industry: (1) the nature of liquidation and the role of the commissioner, *and* (2) the importance of diversity jurisdiction to insurers.

The history, mechanics, and general nature of liquidation proceedings demonstrate that the debt collection function of liquidation does not involve or require a complex regulatory scheme.

The complex regulations relating to insolvent insurance companies have to do with plans of rehabilitation and payment to policy holders. Simple contract and tort actions that happen to involve an insolvent company are not matters of important state regulating concerns or complex state interests.

*Grode v. Mutual Fire, Marine and Inland Insurance Co.*⁴ Although insolvency statutes permit a commissioner to collect debts owed to an insolvent company, they do not regulate the details or procedures of collection. The statutes do not establish specialized courts. Moreover, in collecting debts as a liquidator, the Commissioner's role is no different from that of a common law receiver or private litigant involved in a contractual dispute, and he should not possess a unique power to require that all claims proceed only in state court. To the contrary, the aura of authority of his office and the general deference that state courts are accustomed to affording the Commissioner underscore the appropriateness of exercising diversity jurisdiction in this case.

⁴ 8 F.3d 953, 959 (3d Cir. 1993).

Congress established diversity jurisdiction to protect out-of-state litigants from having to litigate against citizens of another state in that state's own courts. The checks and balances of a federal forum are particularly necessary when insurers are challenged by a state regulator seeking to enforce and avoid private contractual obligations. The McCarran-Ferguson Act does not dictate a contrary conclusion. The Act relates to the *regulation* of insurance. It does not restrict the *jurisdiction* of the federal courts. As discussed below, this Court's recent decision in *United States Department of Treasury v. Fabe*⁵ is significant. *Fabe* confirms that significant aspects of liquidation *are not* the business of insurance and it does not in any way suggest that federal court diversity jurisdiction is precluded.

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⁵ 113 S. Ct. 2202 (1993).

ARGUMENT

I. THE HISTORY, MECHANICS AND OPERATION OF INSURANCE COMPANY INSOLVENCY AND LIQUIDATION AND THE ROLE OF THE COMMISSIONER DEMONSTRATE THAT STATE COURT JURISDICTION IS NOT REQUIRED.

A. The History of Insurance Company Insolvency and Liquidation and the Commissioner's Role as Receiver Show that the Debt Collection Aspect of Liquidation does not Involve a Complex Regulatory Scheme.

For a significant period in the early history of insurance regulation, neither the states nor the federal government enacted statutes that defined the insolvency process, and liquidation was governed by traditional equity receiverships.⁶ The historical antecedent for the modern liquidator is, therefore, the common law receiver. While insurance insolvency proceedings eventually became statutory, the basic principle that the liquidator acts as a receiver has remained virtually unchanged.

The states did not develop substantial statutes governing insurance insolvency until the mid-twentieth century. Although the process became statutory in some states as early as the mid-1800's, it has been stated that "[n]one of this legislation . . . amounted to systematic and comprehensive treatment of the subject."⁷ Even those

⁶ Spencer Kimball, *History and Development of the Law of State Insurance Insolvency Proceedings: An Overview*, in *Law and Practice of Insurance Company Insolvency* 9, 12 (American Bar Ass'n 1986) (hereinafter "Kimball").

⁷ *Id.* at 10.

states that enacted broad statutes failed to provide any details to govern the process.⁸ For example, a New York statute enacted in 1851 merely provided that if it appeared that an insurance company's assets were deficient, the state comptroller could apply to a court for a decree dissolving the company and distributing its assets.⁹

Beginning in 1932, state statutes governing insurance company insolvency became more sophisticated. Leading states such as New York revised their insolvency statutes,¹⁰ and in 1939 the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Insurers Liquidation Act. ("Uniform Act").¹¹ These statutes typically included new provisions that governed priorities for distributing assets, established grounds and procedures for setting aside fraudulent or preferential transfers, defined procedures for filing claims against the estate, and addressed

⁸ *Id.* In their brief *amici curiae*, Massachusetts and the Missouri Director of Insurance maintain that insolvency regulation had become detailed and complex by 1851. Massachusetts/Missouri Brief at 9-10. The authority they cite for this proposition, however, indicates that these statutes hardly constituted significant regulation or a comprehensive and complex scheme. See Kimball, *supra* note 6 at 1-10.

⁹ Kimball, *supra* note 6 at 9 (citing Laws of 1851, ch. 95, § 6, contained in Denio's & Tracy's Revised Statutes of the State of New York I:1288, § 30 (1852)).

¹⁰ *Id.* at 11; see also 4 Adelbert G. Straub, Jr., *Examination of Insurance Companies* 409-16 (1954).

¹¹ 13 Uniform Laws Annotated 321-53 (Master ed. 1986 & Supp. 1988).

reciprocity among the states to allow for efficient interstate coordination of insolvency proceedings.¹² Significantly, these improvements did not define procedures for claims made by the estate against third parties, except to confer power upon the liquidator to pursue such claims in court.

The next significant development in insurance insolvency legislation began in the mid-1960's when Wisconsin re-examined the state of insolvency laws and enacted the first modern comprehensive insolvency statute. The innovations of the Wisconsin statute included broad and flexible summary procedures, greater details to govern the management of a troubled company in rehabilitation, and a change in the priorities of asset distribution that departed from the traditional priority schemes.¹³ Inspired by the Wisconsin statute, the National Association of Insurance Commissioners ("NAIC")¹⁴ revisited insurance company liquidation and in 1977 approved the NAIC Model Supervision, Rehabilitation, and Liquidation Act, ("NAIC Model Act"),¹⁵ which was based largely upon the Wisconsin statute.

Significantly, these modern statutes again did not provide detailed provisions regarding claims brought on behalf of a liquidated entity. Debt collection had not been viewed as a function that required detailed regulation

¹² Kimball, *supra* note 6 at 20-21; *see generally* Uniform Act.

¹³ Wisc. Stat. Ann. ch. 645 (West 1995).

¹⁴ The NAIC is a voluntary association of the insurance commissioners of the several states.

¹⁵ Although the NAIC has revised some provisions of the Model Act, most states have adopted the 1977 version.

and it was not a focus of the broad reexamination of liquidation laws undertaken by the Wisconsin legislature or the NAIC. Rather, the goals of the reexamination were to encourage prompt action by commissioners against troubled insurers and to revise the priorities and procedures governing distribution of assets.¹⁶

Today, most states have codes based upon either the Uniform Act or the NAIC Model Act. These statutes confirm that, for debt collection purposes, the commissioner merely steps into the shoes of the insolvent insurer. Notably, the statutes contain almost no provisions governing the details that restrict or guide a liquidator's pursuit of debt collection actions on behalf of the liquidated company. For example, the Uniform Act, which has been adopted by California,¹⁷ consists of twelve provisions, only eight of which relate to the liquidation of a domiciliary insurer.¹⁸ Of these eight, only one addresses the collection of debt, and it merely provides that the Commissioner shall be vested with title to "rights of action" of the insurer.¹⁹ The NAIC Model Act is similarly devoid of comprehensive sections that govern debt collection. Although the Model Act contains more liquidation provisions than the Uniform Act, only four

¹⁶ Wisc. Stat. Ann. ch. 645, Preliminary Comment; Kimball, *supra* note 6 at 15-26, 40-41.

¹⁷ Cal. Ins. Code §§ 1064.1 - 1064.12.

¹⁸ *Id.* §§ 1064.1-1064.2, 1064.4, and 1064.6-1064.10; Uniform Act §§ 1, 2, 4, and 6-10.

¹⁹ Uniform Act, § 2(2); Cal. Ins. Code § 1064.2(b). The Uniform Act also contains two provisions governing the collection of debts owed to out-of-state insurers. Uniform Act §§ 3(2), 10; Cal. Ins. Code §§ 1064.3(b), 1064.10.

address the powers and procedures of a commissioner to collect debt.²⁰ Again, these provisions simply confer upon the commissioner the power to initiate actions against third parties; they do not provide substantive or procedural details or enhance the power of the commissioner to pursue such actions. Most importantly, no provision mandates that a debt collection action on behalf of the estate be litigated in a particular court.

From this history, two important principles emerge. First, the modern liquidator, now almost universally the insurance commissioner under current statutes, is akin to the common law receiver when acting to collect debts on behalf of the insolvent insurer. For this reason, his role and powers are those of a receiver, and not those of a public official charged with public duties.²¹ Second, the development of modern statutes governing insurer insolvencies has not reformed the provisions that allow the commissioner to bring claims against third parties. To the contrary, the additional provisions merely govern priorities of distribution, voidable transfers, procedures for making claims against the estate, and reciprocity among the states. The pursuit of claims by a liquidator against third parties has simply not become a part of a complex web of detailed provisions, but has been largely left to the common law of receivership.

²⁰ Model Act §§ 24, 27, 34, 37.

²¹ See, e.g., *Texas Commerce Bank-El Paso v. Garamendi*, 28 Cal. App. 4th 1234, 1245, 34 Cal. Rptr. 2d 155, 162 (Cal. App. 2 Dist. 1994); *Corcoran v. National Union Fire Ins. Co.*, 143 A.D.2d 309, 310-311, 532 N.Y.S.2d 376, 378 (App. Div. 1st Dep't 1988); NAIC *Receivers Handbook for Insurance Company Insolvencies* 9-6 (1992).

B. Liquidations are not Subject to Detailed Regulation under the Insolvency Statutes.

The basic procedural operation of insurer insolvency statutes is essentially the same in almost every state. The proceedings commence when the particular state's insurance commissioner concludes that an insurer appears financially impaired and initiates a delinquency action in a state court of general jurisdiction.²² At this stage in the proceedings, the commissioner seeks a finding by the court that one of the grounds for delinquency, e.g., "insolvency" of the insurer, exists. If such a finding is supported, the insurer is placed in rehabilitation or liquidation.²³

A rehabilitation (or "conservation") order typically provides that the commissioner shall take immediate possession of the insurer's property, conduct the insurer's business, and take whatever steps are appropriate and necessary to remove the causes and conditions that gave rise to the delinquency proceedings.²⁴ If the rehabilitation is successful, the rehabilitation order may be dissolved;

²² Davis J. Howard, *Uncle Sam Versus the Insurance Commissioner: A Multi Level Approach to Defining the "Business of Insurance" Under the McCarran-Ferguson Act*, 25 Willamette L. Rev. 1 (1989) (hereinafter "Howard"); Cal. Ins. Code § 1011; NAIC Model Act § 11. See generally Jack W. Traylor, *The Liquidation Process, in Law and Practice of Insurance Company Insolvency* 63 (American Bar Ass'n 1986).

²³ *Id.*; see also Cal. Ins. Code § 1016; NAIC Model Act §§ 16-23.

²⁴ Cal. Ins. Code § 1011; Wolcott B. Dunham, Jr., 2 New York Insurance Law, § 16.04(2)(a) (1995) (hereinafter "Dunham"); NAIC Model Act § 17.

otherwise, the commissioner may seek a liquidation order.

Liquidation constitutes corporate death. The company ceases to conduct the business of insurance, policies are cancelled, and the commissioner winds up the company's affairs.²⁵ Upon entry of the liquidation order, the commissioner is appointed liquidator and becomes a private trustee for the liquidated company's estate. The primary function of the commissioner under a liquidation order is to collect the insurer's assets to distribute them among creditors according to the priority statute and to wind up the company's affairs.²⁶

Typically, the liquidation order provides that all policies are deemed cancelled as of a particular date, that all actions against the insurer shall be stayed, that the insurer will cease defending cases on behalf of insureds, and that all policyholders, claimants, beneficiaries and general creditors shall be provided with notice of the liquidation and a proof of claim form for submission to the liquidator.²⁷ Upon entry of a liquidation order, the commissioner is vested immediately with title to all of the insurer's property, including contracts and causes of action.²⁸ While the commissioner as liquidator may initiate proceedings to collect debts under any such contracts, he acts as a private trustee for the insolvent company's

²⁵ Dunham, *supra* note 22 § 16.04(3); Kimball, *supra* note 6 at 29-38.

²⁶ Cal. Ins. Code § 1057; *Texas Commerce Bank*, 28 Cal. App. 4th at 1244, 34 Cal. Rptr. 2d at 161.

²⁷ Howard, *supra* note 20; Cal. Ins. Code § 1016.

²⁸ Cal. Ins. Code §§ 1011, 1064.2(b).

estate²⁹ and may enforce the contracts only subject to any rights and defenses that may have been asserted against the insolvent insurer.³⁰

Once the liquidator has marshalled the estate's assets, his remaining task is to distribute them among creditors according to state priority statutes. Generally, top priority is given to administrative expenses. Next is the usually modest payment of salaries to the insurer's employees. Policyholders, third party claimants and beneficiaries receive the next priority, followed by general creditors and all other claimants.³¹

Notable in the operation and mechanics of insolvency statutes is that liquidation is not subject to significant regulation. *Amici* do not suggest that contested contract claims are insignificant in terms of the value that such claims may have as estate assets. Rather, enforcing contractual rights is simply left to the adversary process

²⁹ Cal. Ins. Code § 1057, *Texas Commerce Bank*, 28 Cal. App. 4th at 1244, 34 Cal. Rptr. 2d at 161.

³⁰ *Prudential Reinsurance Co. v. Superior Court (Garamendi)*, 3 Cal. 4th 1118, 1125, 842 P.2d 48, 52, 14 Cal. Rptr. 2d 749, 753 (Cal. 1992); Cal. Ins. Code §§ 1011, 1037(b) and (f), 1064.2(b).

³¹ Policyholders' recovery is not limited to estate assets, but may also be satisfied from state insurance guaranty association funds. See, e.g., Cal. Ins. Code §§ 1063-1063.15; see generally Michael P. Duncan, *The NAIC Model Property and Casualty Post Assessment Guaranty Funds*, in *Law and Practice of Insurance Company Insolvency* 459 (American Bar Ass'n 1986). All states have property and casualty guaranty association funds. The Mission Group of Insurance Companies was licensed in all fifty states, and thus, each state's fund was triggered by its insolvency. Insurers are the providers of guaranty association funds.

that governs typical commercial disputes between private citizens.

C. The Nature of Debt Collection in Liquidation and the Commissioner's Role Create a Need for Diversity Jurisdiction.

In most aspects of insurance regulation (*i.e.*, licensing insurers, setting rates, imposing assessments, and regulating agents and brokers), the commissioner acts as a state official charged with a public duty. The commissioner's role as a liquidator, however, is legally akin to that of a private citizen acting on behalf of a private entity. Upon entry of the liquidation order, the commissioner steps into the shoes of the liquidated entity and does not act as a state official.³² His duties are to the estate of the liquidated company, not to the public at large.³³

The fact that the commissioner's role changes when he becomes a liquidator is significant to the issues presented in this case. First, the commissioner as a liquidator is little more than a debt collection agent. Consequently,

³² *Prudential Reinsurance*, 3 Cal. 4th at 1137, 842 P.2d at 59, 14 Cal. Rptr. 2d at 760, (commissioner, when acting as a liquidator, "steps into the shoes of the insolvent insurer"); *Texas Commerce Bank*, 28 Cal. App. 4th at 1245, 34 Cal. Rptr. 2d at 162 (unlike his usual role as public official acting on behalf of the state, the commissioner acting as receiver for a particular insolvent insurer "steps into the shoes of that insurer").

³³ *Texas Commerce Bank*, 28 Cal. App. 4th at 1244 34 Cal. Rptr. 2d at 161; *National Union*, 143 A.D.2d at 310-311, 532 N.Y.S. 2d at 378.

he cannot hide behind the assertion that he is enforcing public policy as defined in a complex regulatory scheme. The principles set forth by this Court in *Burford v. Sun Oil Co.*³⁴ ("*Burford*") and *New Orleans Pub. Serv. Inc. v. New Orleans ("NOPSI")*,³⁵ therefore, do not require a federal court to abstain from hearing commercial disputes that arise in liquidation proceedings. Second, while the commissioner acts in a private capacity, he retains his purported position of authority. This purported authority is a significant advantage in litigation, undermining the right of adverse parties to advocate their rights on an even playing field. If a liquidator were able to avoid appearing in federal court, then the liquidator would receive an unfair advantage by appearing only in a court that is accustomed to affording him great deference.³⁶ This unfair advantage is ameliorated by the ability of insurers with adverse interests to invoke federal diversity jurisdiction.

The *amici* in support of the Commissioner contend, *inter alia*, that a state forum is necessary to permit the commissioner to marshal assets effectively, because the adverse party will enter the action "with the goal of maximizing its benefit at the expense of those interested

³⁴ 319 U.S. 315 (1943).

³⁵ 491 U.S. 350 (1989).

³⁶ See Ronald A. Jacks, *Arbitration and Insurer Insolvencies: The Triumph of Common Sense Over Abstract Principle*, in *Law and Practice of Insurance Company Insolvency* 259, 261-62 (American Bar Ass'n 1986) (discussing the "home field advantage" that state liquidators enjoy in "a friendly forum where they can expect to be treated with something more than normal deference").

in the liquidation estate."³⁷ This is the case in any commercial litigation. Moreover, the *amici* ignore that the commissioner himself is charged with maximizing the estate's benefits at the expense of adverse third parties. The relevant factor is that in state court, the commissioner may be given an unfair advantage through the aura of authority created by his office, despite his role as a private litigant.

The position of the liquidator as representative of private interests is underscored by the fact that the compensation of those employed to assist collecting debts is directly related to the assets collected for the estate. Under all liquidation statutes, the commissioner is given the power to hire deputies, attorneys, accountants, and any other employees that he deems necessary in the administration of the estate. The statutes further provide that the compensation of such employees and agents is to be paid from the assets of the estate.³⁸ Consequently, the commissioner's duty to maximize assets is greatly assisted by a considerable financial incentive on the part of his agents to aggressively pursue all claims. Indeed, Congress has recognized that the liquidations of large estates, like Mission's, generate millions of dollars in fees paid to law firms and consultants employed to collect claims. Congress expressed concern that this creates a "perception that insolvent companies are more valuable

³⁷ Massachusetts/Missouri Brief at 14.

³⁸ Cal. Ins. Code §§ 1035, 1036, and 1064.2(c); Model Act § 24(A)(1)-(2) and (5); Uniform Act § 2(3).

dead than alive for those with a financial stake in the process of carving up the carcass."³⁹

Moreover, due to the nature of insolvency, the pursuit of causes of action need not be adjudicated in one forum. This principle is demonstrated first and foremost by the absence of any provisions in the insolvency statutes that require debt collection actions to be litigated in a single liquidation court. Despite the Commissioner's constant protests that litigation in other courts would somehow impair the liquidation and is somehow prohibited, he has failed to cite a statutory provision restricting the available courts for adjudicating such claims, and he has failed to present any showing that a federal adjudication of a commercial dispute would actually impair the liquidation proceedings.⁴⁰

In liquidation the goal is simply to collect debts and pay claims in preparation for the inevitable dissolution of the company. As one former Special Deputy in the New York State Insurance Department Liquidation Bureau has

³⁹ House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Failed Promises, Insurance Company Insolvencies*, 101st Cong. 2d sess. (1990).

⁴⁰ The Missouri and Massachusetts *amici* in support of the Commissioner assert that debt collection proceedings must be handled by the liquidation court because such courts have peculiarized knowledge and they are thus better able to make an informed decision. Massachusetts/Missouri Brief at 15. These *amici*, however, fail to explain how an informed resolution of a straightforward commercial dispute, even when one of the parties is in receivership, somehow requires a special or peculiar knowledge so unique to state courts that no federal judge or insurance/reinsurance arbitration panel could decide the issues competently or without disrupting the insolvency proceeding.

stated, "In liquidation, it is over, there is a funeral, the company is buried and we go on to liquidate its assets and pay its claims."⁴¹ The Commissioner's claim that adjudication of a contract action in a federal forum is in conflict with the mechanisms and goals of the insolvency statutes is therefore illogical and untenable.

In sum, the nature of debt collection and the role of the commissioner as liquidator do not necessitate a specialized state forum. To the contrary, these factors support the right of the insurers to seek a federal forum on the basis of diversity jurisdiction.

II. THE RIGHT OF ACCESS TO THE FEDERAL COURTS UNDER DIVERSITY JURISDICTION IS AN IMPORTANT SAFEGUARD TO INSURERS IN CONTRACT ACTIONS BROUGHT BY STATE INSURANCE COMMISSIONERS IN THEIR ROLE AS LIQUIDATOR.

Diversity jurisdiction has always been a fundamental tenet of the federal court system. The framers of the Constitution recognized that in order to ensure fairness in litigation between a local entity and an out-of-state party, free and ready access should be provided to the federal courts.⁴² The First Congress agreed and promptly

⁴¹ Leonard Minches, *Roadmap to Rehabilitation and Liquidation Proceedings*, in *Law and Practice of Insurance Company Insolvency* 93, 100 (American Bar Ass'n 1986).

⁴² Some commentators have questioned whether federal diversity jurisdiction was grounded on a fear of local prejudice against out-of-state citizens or on some other reason, such as the apprehension of commercial interests in submitting themselves

created the federal courts and vested them with jurisdiction in cases "where an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state."⁴³ At the same time that Congress created diversity jurisdiction, it also created as part of the Judiciary Act of 1789 the right to remove cases from the state courts to the federal courts on the basis of diversity of citizenship.⁴⁴

In an early decision, Justice Story explained the basis for diversity jurisdiction:

The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies . . . between citizens of different states . . . it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.⁴⁵

Both diversity jurisdiction and the right of an out-of-state entity to remove have remained a part of our judicial system for more than 200 years. While proposals to

to the hazards of state courts with elected judges and limited review of legislative acts. See Paul M. Bator, Paul J. Mishkin, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 1658-59 (3d ed. 1988).

⁴³ Judiciary Act of 1789, ch. 20, § 11-12, 1 Stat. 73, 78, 79.

⁴⁴ *Id.*

⁴⁵ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816).

either limit or abolish diversity jurisdiction have been made ever since federal diversity jurisdiction was established in 1789,⁴⁶ it is well recognized that only Congress, and not the courts, is authorized to do so. Congress has not done so. Justice Frankfurter, an ardent foe of federal diversity jurisdiction, made this point in his dissent in *Burford*:

The reasons which led Congress to grant such jurisdiction to the federal courts are familiar. It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. . . . Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders . . . these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine.⁴⁷

Consistent with the premise that only Congress may limit federal diversity jurisdiction, this Court has acknowledged that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred."⁴⁸ Indeed, this Court has described the federal

⁴⁶ See Victor Flango, *How Would Abolition of Federal Diversity Jurisdiction Affect State Courts?* 74 *Judicature* 35 n.1 (June/July 1990) (discussing the history of the debate on diversity jurisdiction).

⁴⁷ 319 U.S. 315, 337 (1943).

⁴⁸ *NOPSI*, *supra*, 491 U.S. at 358.

courts' obligation to adjudicate claims within their jurisdiction as "virtually unflagging."⁴⁹

The concerns that motivated the framers of the Constitution to vest diversity jurisdiction in the federal courts exist today. Authoritative studies conducted in recent years have repeatedly documented the widespread perception held by litigants⁵⁰ and, indeed, by the judiciary,⁵¹ that out-of-state (or commercial) defendants may be subject to bias in the state courts.

Because of their extensive involvement and participation in litigation throughout the country, insurers are

⁴⁹ *Id.* at 359 (citations omitted).

⁵⁰ See, e.g., Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 *Am. U. L. Rev.* 369, 408-09 (Winter 1992) (study reported that fifty-four percent of plaintiffs' attorneys reported bias against defendants in state court, with more than half that number ascribing such bias to defendant's out-of-state status; attorneys for insurers were most likely (fifty-nine percent) of all defense attorneys to report out-of-state bias); Victor Flango, *Attorneys' Perspectives on Choice of Forum in Diversity Cases*, 25 *Akron L. Rev.* 41, 105 (1991) (fear of prejudice against out-of-state residents and corporations is significant consideration in attorneys' forum choice).

⁵¹ See Federal Judicial Center, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* 4, 26 (1994) (forty-eight percent of circuit judges and forty percent of district judges believed that state court bias was at least somewhat a problem); see also Charles L. Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way With Its Feet*, 61 *N.Y. State Bar J.* 20 (July 1989) (Judge Brieant states that diversity jurisdiction has met objectives of ensuring impartial administration of law and protecting out-of-state litigants from local prejudices).

particularly aware of and subject to the issues involving choice of forum and the circumstances calling for diversity jurisdiction. *Amici* do not criticize the state court system or minimize the important role it plays. Insurance companies participate in state court proceedings in a vast array of situations, including actions directly involving state regulation of insurers and actions involving the commissioner of insurance in his capacity as a neutral regulator.

It must be recognized, however, that in situations where the interests of the citizens of a state are at stake, there is a widespread perception that insurers are at a distinct disadvantage in the state court system.⁵² The disadvantages or perceived disadvantages confronting insurers in state court may, moreover, be exacerbated by the growth in claims and increasing hostility against insurers.⁵³

⁵² Willy E. Rice, *Judicial Bias, The Insurance Industry And Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad Faith, Breach Of Contract, Breach-Of-Covenant-Of-Good-Faith And Excess-Judgment Decisions, 1900-1991*, 41 Cath. U. L. Rev. 325, 331 (Winter 1992) (state courts "allow extra-legal factors, which have little to do with the merits of the suits, to influence the disposition of insurance-related cases"); *id.* at 369 (state courts "unintentionally allow the types of insured to influence the disposition of . . . actions").

⁵³ See *Insurance Industry Target in Rising Spate of Lawsuits*, Los Angeles Times, May 30, 1989 at 9 (reporting "anger in many quarters toward the [insurance] industry" stemming in part from problems experienced by businesses and municipalities in finding insurance coverage in the 1980's and from the rising cost of insurance); See also *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 43, 46 (1991) (O'Connor, J., dissenting) (criticizing Alabama state courts for "giv[ing] civil juries complete, unfettered,

Insurance liquidations and related litigation are classic examples of the situation where an out-of-state insurer may be at a disadvantage in the state court system. This is so because (a) the commissioner is the adversary, and while he is clothed with the police power of the state, in liquidation proceedings he is not acting as a neutral regulator but as a representative of a private business, and (b) the liquidator's sole job is to maximize recoveries, and while this may be a laudable goal, it is one which could put the deep pocket out-of-state insurer at extreme disadvantage in the state court system. This is particularly true where a limited fund is available. Thus, the fundamental considerations that led to the establishment of diversity jurisdiction are especially present here.

As set forth above, an understanding of the liquidation statutes and the role of the liquidator reveals that debt-collection actions do not *require* state court involvement. In *NOPSI*, this Court held that the principles underlying *Burford* abstention are not implicated where the case "does not demand significant familiarity with, and will not disrupt state resolution of, distinctively local regulatory facts or policies."⁵⁴ Debt collection does not implicate these factors. This case and others like it - involving straightforward contract claims - require no greater familiarity with state law than other cases routinely handled by the federal courts and pose no threat of

and unchanneled discretion to determine whether . . . to impose punitive damages," thus permitting juries to "target unpopular defendants . . . and redistribute wealth.").

⁵⁴ 491 U.S. at 364.

disruption to "distinctively local regulatory facts or policies."⁵⁵

The abstention doctrine developed by this Court has, moreover, been applied only in very narrowly defined areas and "remains the exception, not the rule."⁵⁶ The essentially automatic abstention sought by the Commissioner in all cases relating to insurer liquidations is impossible to reconcile with the exceptional nature of abstention.

Nor does the McCarran-Ferguson Act⁵⁷ affect the determination of whether abstention is proper in this case. The Act provides only that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . ." ⁵⁸ While the policy behind the Act is to leave the *regulation* of insurers to the states, the Act does not modify or even address the diversity

⁵⁵ See *Grode v. Mutual Fire, Marine and Inland Insurance Co.*, 8 F.3d 953, 959 (3d Cir. 1993) ("Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests"); cf. *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992) (reversing remand to state court and enforcing arbitration agreement because rights liquidator sought to enforce against reinsurers arose from insolvent insurer's contracts rather than Montana insolvency statute).

⁵⁶ *NOPSI*, 491 U.S. at 359 (citations and internal quotation marks omitted).

⁵⁷ 15 U.S.C. §§ 1011-1015.

⁵⁸ 15 U.S.C. § 1012(b).

jurisdiction of the federal courts in insurance cases.⁵⁹ This Court's recent decision in *United States Dep't of Treasury v. Fabe*⁶⁰ supports this conclusion. The issue in *Fabe* was whether liquidation was the "business of insurance" under the McCarran-Ferguson Act. Four justices concluded that it was not. The majority found that only certain aspects of liquidation – those designed to protect policy holders and to give them priority – constituted the "business of insurance." *Fabe* does not even remotely suggest that the mere existence of a liquidation proceeding could cut off otherwise available rights to a federal forum.

This case presents issues regarding contractual rights of arbitration and set off. No rules or regulations are implicated. These straightforward contractual issues do not necessitate a state forum.

⁵⁹ *Atlantic & Pacific Insurance Co. v. Combined Insurance Co.*, 312 F.2d 513, 515 (10th Cir. 1962); *Grimes v. Crown Life Insurance Co.*, 857 F.2d 699, 702 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); see also *Stamp v. Insurance Co. of North America*, 908 F.2d 1375, 1379 (7th Cir. 1990) ("[N]o state may obliterate the diversity jurisdiction of a district court by claiming exclusive authority over a subject. Federal laws preempt state laws, not the other way 'round").

⁶⁰ 113 S. Ct. 2202 (1993).

CONCLUSION

For the reasons set forth herein and in the briefs of respondent and its other supporting *amici curiae* we respectfully submit that the decision below should be affirmed.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

**CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE
COMPANY TRUST, MISSION NATIONAL INSURANCE
COMPANY TRUST, ENTERPRISE INSURANCE COMPANY
TRUST, HOLLAND-AMERICA INSURANCE COMPANY
TRUST AND MISSION REINSURANCE CORPORATION TRUST,**

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE REINSURANCE ASSOCIATION OF
AMERICA, THE BROKERS AND REINSURANCE
MARKETS ASSOCIATION, AND THE ALLIANCE
OF AMERICAN INSURERS AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

	Page
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. CALIFORNIA DOES NOT HAVE A SUB- STANTIAL INTEREST IN ESTABLISHING EXCLUSIVE JURISDICTION TO ADJUDI- CATE CLAIMS BROUGHT BY THE COMMIS- SIONER AGAINST REINSURERS	9
A. Adjudication Of Claims Against Reinsurers Does Not Implicate Distinctively Local Concerns	10
B. The Commissioner's Claims Against Reinsur- ers Must Be Resolved Through The Applica- tion Of Legal Principles And Not Policy Judgments	12
C. California Law Does Not Vest The Liquida- tion Court With Exclusive Jurisdiction Over The Commissioner's Actions Against Rein- surers	13
D. This Court And The California Supreme Court Have Rejected The View That <i>In Per-</i> <i>sonam</i> Proceedings Impermissibly Interfere With The Conduct Of An Insolvency Pro- ceeding	18
E. Abstention Undermines California Policy By Permitting The Commissioner To Unneces- sarily Impair The Rights Of Reinsurers.....	21
II. ANY RULE GRANTING EXCLUSIVE JURIS- DICTION TO THE LIQUIDATION COURT TO ADJUDICATE CLAIMS AGAINST REINSUR- ERS WOULD CONTRAVENE IMPORTANT FEDERAL INTERESTS	22

TABLE OF CONTENTS—Continued

	Page
A. The Rule Advocated By Petitioner Is Inconsistent With The Federal Interest In Promoting Arbitration	23
B. The McCarran-Ferguson Act Does Not Support Abstention In This Case	26
CONCLUSION	29

TABLE OF AUTHORITIES

CASES	Page
<i>Allied Bruce-Terminex Co. v. Dobson</i> , 513 U.S. —, 115 S.Ct. 834 (1995)	24
<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 398 (1964)	11
<i>Bernstein v. Greater New York Mut. Ins. Co.</i> , 706 F. Supp. 287 (S.D.N.Y. 1989)	16
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943)	7, 10, 12
<i>Carroll v. Brown</i> , 1987 U.S. Dist. LEXIS 613 (N.D. Ill., Jan. 26, 1987)	15
<i>Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.</i> , 489 U.S. 561 (1989)	19
<i>Combs v. Chambers</i> , 302 F. Supp. 194 (N.D. Okla. 1969)	16
<i>Commonwealth Trust Co. v. Bradford</i> , 297 U.S. 613 (1936)	19, 20
<i>Curiale v. Amberco Brokers Ltd.</i> , 766 F. Supp. 171 (S.D.N.Y. 1991)	16
<i>Dean Witter Reynolds, Inc. v. Bird</i> , 470 U.S. 213 (1985)	24
<i>Donovan v. Dallas</i> , 377 U.S. 408 (1964)	28
<i>Eakin v. Continental Illinois Bank & Trust</i> , 212 F.R.D. 363 (N.D. Ill. 1988)	15
<i>Evans v. American Surplus Underwriters Corp.</i> , 739 F. Supp. 1526 (N.D. Ga. 1989)	15
<i>Fidelity & Deposit v. Pink</i> , 302 U.S. 224 (1937)	15
<i>Garamendi v. Abeille-Pair Reassurances</i> , No. C83233 (Cal. Sup. Ct., Los Angeles, Feb. 2, 1995)	3, 5
<i>General Atomic Co. v. Felter</i> , 434 U.S. 12 (1977)	28
<i>Granfinanciera v. Norberg</i> , 492 U.S. 33 (1989)	20
<i>Grimes v. Crown Life Ins. Co.</i> , 867 F.2d 699 (10th Cir. 1988), cert. den'd, 489 U.S. 1096 (1989)	28
<i>Harris v. Capital Growth Investors XIV</i> , 805 P.2d 873 (1991)	13
<i>Hartford Fire Insurance Co. v. California</i> , 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993)	26
<i>Jump v. Goldenhersh</i> , 474 F. Supp. 1306 (E.D. Mo. 1979)	16

TABLE OF AUTHORITIES—Continued

	Page
<i>Jump v. Manchester Data Sciences Corp.</i> , 424 F. Supp. 442 (E.D. Mo. 1976)	16
<i>Jump v. Manchester Life & Cas. Management Corp.</i> , 438 F. Supp. 185 (E.D. Mo. 1977)	16
<i>Jump v. Pioneer Bank & Trust Co.</i> , 433 F. Supp. 38 (E.D. Mo. 1977)	16
<i>Keehn v. Excess Ins. Co. of America</i> , 129 F.2d 503 (7th Cir. 1942)	16
<i>Kinder v. Superior Court of Orange County</i> , 144 Cal. Rptr. 291 (Cal. Ct. App. 1978)	21
<i>Long v. Alexander & Alexander Servs.</i> , 680 F. Supp. 746 (E.D.N.C. 1988)	15
<i>Lyons v. Jefferson Bank & Trust</i> , 781 F. Supp. 1525 (D. Colo. 1992)	16
<i>Markham v. Allen</i> , 326 U.S. 490 (1946)	19, 20
<i>Metropolitan Life Ins. Co. v. Ward</i> , 470 U.S. 869 (1985)	28
<i>Morgan v. American Risk Management</i> , 1990 U.S. Dist. LEXIS 9037 (S.D.N.Y., July 20, 1990)	15
<i>Morris v. Jones</i> , 329 U.S. 545 (1947)	18, 19
<i>New Orleans Public Serv., Inc. v. Council of New Orleans</i> , 491 U.S. 350 (1989)	10, 26
<i>Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.</i> , 458 U.S. 50 (1982)	20
<i>O'Connor v. Insurance Co. of North America</i> , 622 F. Supp. 511 (N.D. Ill. 1985)	16
<i>Penn General Cas. Co. v. Pennsylvania</i> , 294 U.S. 189 (1935)	7, 10, 19
<i>Pennsylvania v. Williams</i> , 294 U.S. 176 (1935)	19
<i>Prudential Lines v. Exxon Corp.</i> , 704 F.2d 59 (2d Cir. 1983)	24
<i>Prudential Reinsurance Co. v. Superior Court</i> , 842 P.2d 48 (Cal. 1992)	4, 12, 22
<i>Rozani Gillespi, Ins. Comm. of California, as Liquidator of C-F-Ins. Co. v. Waite-Hill Assurance, Ltd.</i> , Case No. 87-08504, RMT (KX) (C.D. Cal. 1987)	16
<i>Scherk v. Alberto-Culver Co.</i> , 417 U.S. 506 (1974)	11, 24, 25

TABLE OF AUTHORITIES—Continued

	Page
<i>SEC v. National Securities, Inc.</i> , 393 U.S. 453 (1969)	27
<i>Smith v. Abbate</i> , 201 F. Supp. 105 (S.D.N.Y. 1961)	16
<i>Stamp v. Insurance Co. of North America</i> , 908 F.2d 1375 (7th Cir. 1990)	4, 15, 28
<i>Superintendent of Ins. of New York v. Bankers Life & Cas. Co.</i> , 300 F. Supp. 1083 (S.D.N.Y. 1969)	16
<i>Superintendent of Ins. of New York v. Freedman</i> , 443 F. Supp. 628 (S.D.N.Y. 1978)	16
<i>Todd v. Deposit Guar. Nat'l Bank</i> , 849 F. Supp. 1149 (S.D. Miss. 1994)	15
<i>United Labor Life Ins. Co. v. Pireno</i> , 458 U.S. 119 (1982)	27
<i>United States Dept. of Treasury v. Fabe</i> , 508 U.S. —, 113 S.Ct. 2202 (1993)	15, 27
<i>United States v. Consumer Life Ins. Co.</i> , 430 U.S. 725 (1977)	3
<i>Webster v. Superior Court</i> , 758 P.2d 596 (1988)	14, 19

STATUTES

28 U.S.C. § 1441	6
Cal. Ins. Code § 1011	13
Cal. Ins. Code § 1020	8, 14
Cal. Ins. Code § 1031	4
Cal. Ins. Code § 1035	13
Cal. Ins. Code § 1037	6, 13
Cal. Ins. Code § 1058	13, 21
Cal. Ins. Code § 1063	17
Cal. Ins. Code § 1064	18
Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-208	passim
McCarran-Ferguson Act, 15 U.S.C. § 1012	23, 26

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TABLE OF AUTHORITIES—Continued

	Page
Graydon S. Staring, <i>The Law of Reinsurance</i> (1993)	3, 11
John L. Baringer, <i>The Reinsurance Market: The Assuming Reinsurer, in Reinsurance</i> (Robert W. Strain, ed., 1980)	3
Marilyn J. Laughlin, <i>General Clauses for Most Treaties, in Reinsurance Contract Wording</i> (Robert W. Strain, ed., 1992)	4
R. Carter, <i>Reinsurance</i> (1979)	24
RAA, <i>The U.S. Reinsurance Market in 1993: An Analysis of Annual Statement Data</i> (1995)	11
Subcomm. On Oversight and Investigations of the Committee on Energy in Commerce, 101st Cong., 2nd Sess., <i>Failed Promises: Insurance Company Insolvencies</i> (Comm. Print 1990)	5, 11, 22
Thomas M. Tobin, <i>The Facultative Contract, in Reinsurance Contract Wording</i> (Robert W. Strain, ed., 1992)	4
Thompson, <i>Reinsurance</i> (4th ed. 1966)	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

 No. 95-244

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF
 THE STATE OF CALIFORNIA, IN HIS CAPACITY AS
 LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE
 COMPANY TRUST, MISSION NATIONAL INSURANCE
 COMPANY TRUST, ENTERPRISE INSURANCE COMPANY
 TRUST, HOLLAND-AMERICA INSURANCE COMPANY
 TRUST AND MISSION REINSURANCE CORPORATION TRUST,

 Petitioner,
 v.

ALLSTATE INSURANCE COMPANY,

 Respondent.

On Writ of Certiorari to the
 United States Court of Appeals
 for the Ninth Circuit

**BRIEF OF THE REINSURANCE ASSOCIATION OF
 AMERICA, THE BROKERS AND REINSURANCE
 MARKETS ASSOCIATION, AND THE ALLIANCE
 OF AMERICAN INSURERS AS AMICI CURIAE
 IN SUPPORT OF RESPONDENT**

INTEREST OF THE AMICI CURIAE

This brief is filed on behalf of three nonprofit trade associations whose members include companies engaged in the reinsurance business.¹ The Reinsurance Associa-

¹ Letters have been filed with the Clerk of the Court confirming that all parties have consented to amici's submission of this brief.

tion of America ("RAA") has 29 member companies, including professional reinsurers and reinsurance departments of insurance companies, principally engaged in the business of assuming property and casualty reinsurance. Approximately one half of RAA member companies are owned by foreign parent companies. Together, RAA members write over 75 percent of the reinsurance written by American professional property and casualty reinsurers on domestic risks. The Brokers and Reinsurance Markets Association ("BRMA") represents domestic reinsurance brokers, professional reinsurers, and reinsurance departments of insurance companies, all of whom obtain business through reinsurance brokers. The Alliance of American Insurers ("Alliance") represents over 250 insurance companies nationwide, including some reinsurers.

Amici's members have a substantial interest in this Court's interpretation of the federal rights afforded to reinsurers sued by state receivers of insolvent insurers. Most reinsurance contracts specify that all disputes must be resolved through arbitration, and reinsurers frequently invoke the jurisdiction of the federal courts to secure enforcement of these contractual terms under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-208 (1995) (the "FAA"). The rule Petitioner ("Petitioner" or "Commissioner") advocates in this case, however, would permit States to vitiate these rights whenever contractual claims are asserted by the receiver of an insolvent insurer. Any such rule would have a far-reaching impact on domestic and foreign reinsurers in light of the frequency and magnitude of insurance insolvencies.² Amici accordingly submit this brief in support of Respondent.

STATEMENT

1. This case arises out of Petitioner's claim that Allstate Insurance Company ("Allstate" or "Respondent")

² Between 1969 and 1990, 372 property/casualty insurers in the United States became insolvent. A.M. Best, *Best's Insolvency Study: Property/Casualty Insurers, 1969-1990* 1-2 (June 1991).

failed to pay sums due under the terms of its reinsurance contracts with Mission Insurance Company ("Mission"). Reinsurance is essentially insurance for insurance companies: such agreements are designed to spread and distribute risks of loss among a large number of companies. Thompson, *Reinsurance* 9, 24-25 (4th ed. 1966). In this way, an insurer's risk of insolvency in the event of a catastrophic loss is reduced; smaller insurers are able to offer coverage for large risks that might otherwise exceed their capacity; and insurers are able to offer a greater number of policies to the public. See, e.g., *United States v. Consumer Life Ins. Co.*, 430 U.S. 725, 737-738 (1977). The Mission group of insurance companies had in fact entered into thousands of reinsurance agreements with reinsurers located throughout the United States and two dozen other countries. Pet. Br. at 10 n.25; Resp. Br. at 9.

Reinsurance agreements such as those at issue in this case have traditionally included a variety of terms designed to foster cooperation between the parties and to minimize costs. First, in order to avoid excessive operating costs that would make reinsurance too expensive, reinsurers rely on insurers' representations regarding a broad range of issues, including underwriting and claims processing by way of example, and forge a "bond of trust" that imposes a heightened duty of utmost good faith. John L. Baringer, *The Reinsurance Market: The Assuming Reinsurer*, in *Reinsurance* 329, 343 (Robert W. Strain, ed., 1980); Graydon S. Staring, *The Law of Reinsurance* 8:4 at 6 (1993). Adherence to these duties is so fundamental to the scheme of reinsurance that the law of California and other jurisdictions generally permit reinsurers to rescind their contractual agreements when an insurer deceptively breaches these duties. See, e.g., *Garamendi v. Abeille-Paix Reassurances*, No. C83233 (Cal. Sup. Ct., Los Angeles, Feb. 2, 1995).

Second, it has also long been the standard practice of most reinsurers to include clauses in contracts of rein-

surance that require binding, nonjudicial arbitration, and virtually all of Allstate's contracts with Mission contained such clauses. Resp. Br. at 10 n.15. Congress has recognized the importance of arbitration to the cost effective adjudication of disputes through the adoption of the FAA. The California Insurance Code does not contain any provisions purporting to abrogate a reinsurer's right to arbitrate in accordance with the terms of its contract.

Third, contractual rights of setoff are a fundamental feature of ongoing commercial relationships in the reinsurance industry because they promote economy of time and resources in settling debts between parties. Almost all reinsurance agreements contain setoff clauses.³ The California Legislature has recognized the importance of setoff rights to the efficiency of insurance markets and specifically preserved such rights in the context of insurance insolvencies. Cal. Ins. Code. § 1031 (1995).⁴

2. In 1987, the California Insurance Commissioner sought and obtained an order from the California Superior Court declaring the Mission Insurance Company insolvent. J.A. 23-24. Petitioner contends (Pet. Br. 3, 12) that reinsurers caused Mission's insolvency by failing to pay sums due under the terms of their reinsurance agreements. That assertion is not supported by evidence in this record, however, and is refuted by a recent Congressional

³ Marilyn J. Laughlin, *General Clauses for Most Treaties*, in *Reinsurance Contract Wording* 41, 86-88 (Robert W. Strain, ed., 1992); Thomas M. Tobin, *The Facultative Contract*, in *Reinsurance Contract Wording* 427, 442-443 (Robert W. Strain, ed., 1992).

⁴ The California Supreme Court has upheld the right of reinsurers to setoff debts in the context of an insolvency, noting that "[t]o disallow setoff . . . would not only subvert clear legislative intent, but would also lead to an increased cost of insurance for the consumer, because offsetting an insurer's debts spreads the risks incurred by the insurer and often allows smaller insurers to remain in business." *Prudential Reinsurance Co. v. Superior Court*, 842 P.2d 48, 51 (Cal. 1992); see also, *Stamp v. Insurance Co. of North America*, 908 F.2d 1375, 1380 (7th Cir. 1990).

investigation. See Subcomm. on Oversight and Investigations of the Committee on Energy in Commerce, 101st Cong., 2nd Sess., *Failed Promises: Insurance Company Insolvencies*, 11-24 (Comm. Print 1990) (the "Dingell Report" or the "Report").

Contrary to Petitioner's assertions, the Dingell Report concluded that, "[t]he story of Mission's failure is really a tale of reckless and incompetent management." Dingell Report at 14.⁵ In fact, the Report noted that the "subcommittee found several types of fraudulent activity at Mission," including fabrication of financial data submitted to reinsurers, false reports to state regulators, and bad faith dealing. *Id.* at 16-19. In addition, the Report further emphasized that Mission "abused the [reinsurance] system," through "excessive use of reinsurance," and by "knowingly deceiv[ing] the reinsurers who relied on them." *Id.* at 10, 12, 14. A three judge panel appointed by Mission's receivership court in fact concluded that various foreign reinsurers were entitled to rescind their contracts with Mission based upon Mission's misconduct. *Garamendi v. Abeille-Paix Reassurances*, No. C83233 (Cal. Sup. Ct., Los Angeles, Feb. 2, 1995).⁶

The conclusions set forth in the Dingell Report are also consistent with other studies of the causes of insurer insolvencies.⁷

⁵ Such mismanagement "took various forms, including poor underwriting, severe underpricing, grossly inadequate reserving, accounting gimmicks, false reporting, and an overall disregard for the well being of Mission and the constraints of the marketplace." *Id.*

⁶ The panel's decision has been recommended to the liquidation court, but the court has not yet confirmed that decision.

⁷ According to a leading industry source, there were eight primary causes of most insurance company insolvencies between 1969 and 1990, and the failure of insurers to pay their obligations under reinsurance contracts was cited as a cause in only 7 percent of the insolvencies studied. A.M. Best, *Best's Insolvency Study: Property/Casualty Insurers 1969-1990* 45-46 (June 1991).

3. Under Cal. Ins. Code § 1037 (1995), the Commissioner is vested with authority to "collect all monies due" an insolvent insurer and to "prosecute . . . legal proceedings" for that purpose. Pursuant to these powers, the Commissioner initiated litigation against Allstate and other reinsurers seeking to recover amounts allegedly due under the terms of the reinsurance agreements. The complaint alleged that the defendants breached the terms of their contracts by failing to pay sums due and engaging in tortious conduct that allegedly caused financial losses to Mission.⁸ J.A. at 35-63.

Although the Commissioner chose to file his action in the State Superior Court overseeing the Mission liquidation, nothing in the California statutes or the orders issued by the liquidation court required him to do so. See February 24, 1987 Order Appointing Liquidator and Restraining Order at ¶ 8, J.A. 26-28 (enjoining "[a]ll persons . . . from instituting or prosecuting any action or proceedings against [Mission], or . . . [t]he liquidator of [Mission], without the consent of this Court") (emphasis added).

Allstate did not institute any action against the Commissioner. Instead, Allstate simply removed the action that had been filed against it to federal court as expressly permitted by federal statute, see 28 U.S.C. § 1441 (1994), and filed a motion to stay the federal proceedings pending arbitration pursuant to the terms of the FAA. 9 U.S.C. § 4 (1970).

SUMMARY OF ARGUMENT

Petitioner and his amici contend that federal courts are required to undertake a balancing of state and federal interests in deciding whether to abstain from exercising jurisdiction, and that the Ninth Circuit's decision must be reversed because it failed to follow that rule. This Court should reject that view and affirm the decision of the

⁸ Allstate was not named in the tort counts of the complaint.

Ninth Circuit on either of two independent grounds. First, for the reasons set forth in the brief of Respondent and not addressed herein, federal courts have discretion to weigh competing interests and decline the exercise of jurisdiction only in cases involving a limited category of claims seeking equitable relief. No such claims are at issue in this case. Second, even if this Court were to accept Petitioner's argument that a balancing of interests is required, it should nevertheless affirm the decision of the Ninth Circuit. California does not have a substantial interest in establishing exclusive jurisdiction to adjudicate the Commissioner's claims against reinsurers, and the federal interests in providing a forum to both domestic and foreign corporations and in promoting the enforcement of arbitration agreements must prevail.

I. This Court has never authorized abstention in the absence of a substantial state interest that is substantially impaired through the exercise of federal jurisdiction. Petitioner claims that California has just such an interest in this case because it has established exclusive jurisdiction to adjudicate claims brought by the Commissioner against reinsurers in the liquidation court, and that the liquidation scheme "cannot be meaningfully carried out if the various elements necessary to the process can be spread out over multiple jurisdictions." Pet. Br. at 31. Petitioner contends that this Court has already found such interests sufficient to support abstention in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Penn General Cas. Co. v. Pennsylvania*, 294 U.S. 189 (1935). This Court's precedents, however, leave no room for that conclusion. None of the factors that have supported a finding that the State had a substantial interest in the assertion of exclusive jurisdiction are present in this case.

First, the Commissioner's adjudication of claims against reinsurers does not implicate "distinctively local" interests of the State. As Petitioner in fact concedes, the "reinsurance market is international" and the availability of reinsurance through the international markets is essential to an insurer's ability to "issue additional policies to the public." Pet. Br. at 10, 11.

Second, the State does not have a substantial interest in asserting exclusive authority over the Commissioner's claims against reinsurers because the Commissioner and the California courts do not have discretion to weigh public policy factors in adjudicating such claims in the aftermath of an insolvency. Instead, such disputes must be resolved with common law and statutory principles which can readily be applied by federal courts.

Third, the California Legislature has not even purported to vest the liquidation court with exclusive jurisdiction over the Commissioner's actions against reinsurers. In a variety of respects, the scheme adopted by California recognizes the necessity for adjudication in multiple jurisdictions. Contrary to Petitioner's contentions, the liquidation court did not even purport to enjoin the initiation of this action against Allstate outside the liquidation court, and the California Supreme Court has expressly held that Cal. Ins. Code § 1020 (court's power to issue injunctions) does not vest exclusive jurisdiction in the liquidation court.

Fourth, California does not have a substantial interest in asserting exclusive jurisdiction because this Court has repeatedly held that the exercise of *in personam* jurisdiction over claims related to an *in rem* proceeding does not impermissibly interfere with ongoing *in rem* proceedings in state court. The California Supreme Court has in fact acknowledged the logic of this rule and upheld the right of a plaintiff to bring a personal injury action against an insolvent insurer outside the liquidation court.

Finally, the rule Petitioner seeks would actually undermine the California scheme by abrogating a reinsurer's pre-existing right to remove an action to district court. The insolvency scheme was not designed to strip defendants in actions initiated by the Commissioner from asserting "important rights to which it would be entitled" in the absence of an insolvency.

II. Even if California had an interest in preventing the assertion of federal jurisdiction in this case, that interest would not outweigh the substantial federal interests in providing a forum to diverse defendants and in promoting enforcement of the terms of the FAA.

In this case, Allstate invoked its rights under the FAA to compel binding arbitration in accordance with the terms of its contracts. The FAA establishes that agreements to arbitrate, which are almost universally included in reinsurance contracts, are "valid, irrevocable, and enforceable." The federal interest in securing enforcement of such agreements is in fact so paramount in the context of international agreements—many of which were involved in the Mission insolvency—that Congress has granted district courts federal question jurisdiction, without regard to the amount in controversy, to enforce such agreements, and has granted defendants a right to remove any state court action relating to such an agreement at any time before trial. The rule Petitioner advocates—abstention for the purpose of permitting the liquidation court exclusive jurisdiction to adjudicate all claims—would completely vitiate these important federal interests. Even assuming that a district court were permitted to balance federal and state interests, any such balancing would require the district court to retain jurisdiction.

ARGUMENT

I. CALIFORNIA DOES NOT HAVE A SUBSTANTIAL INTEREST IN ESTABLISHING EXCLUSIVE JURISDICTION TO ADJUDICATE CLAIMS BROUGHT BY THE COMMISSIONER AGAINST REINSURERS

Petitioner contends that the district court should not be permitted to determine whether arbitration is required under the terms of Allstate's reinsurance agreements and the FAA because the California liquidation court assumed "sole and exclusive jurisdiction" over proceedings related to Mission's insolvency pursuant to the California insolv-

ency scheme. Pet. Br. at 18 n.19, 31. According to Petitioner, the liquidation of Mission "cannot be meaningfully carried out if the various elements necessary to the process can be spread out over multiple jurisdictions." Pet. Br. at 31. It is apparent, however, that the California scheme does permit adjudication in "multiple jurisdictions," and that none of the factors underlying this Court's decisions in *Burford v. Sun Oil Co.* and *Penn General Cas. Co. v. Pennsylvania* would permit abstention in this case.

A. Adjudication Of Claims Against Reinsurers Does Not Implicate Distinctively Local Concerns

In *Burford*, the Texas Railroad Commission granted a permit to drill four wells on a Texas oil and gas field. A litigant filed suit in federal court seeking to enjoin the issuance of the permit, and this Court found that abstention was appropriate. In determining that the assertion of federal jurisdiction would disrupt the Texas regulatory scheme, this Court emphasized that the rights in dispute—the availability of a permit to drill oil in Texas—were "distinctively local." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 364 (1989) (explaining *Burford*).

In stark contrast, the contractual relationships of reinsurers are "distinctively" international in character. Petitioner in fact concedes (Pet. Br. at 10) that the "reinsurance market is international" and the availability of reinsurance through international markets is essential to an insurer's ability to "issue additional policies to the public." Pet. Br. at 11. Because one geographic market may have greater capacity to absorb risk than another at a given time, the business of reinsurance freely crosses national and geographical boundaries, and reinsurers spread risks around the world. Thus, "a vast and complex network of reinsurances is widely understood to be essential to the

provision of coverage for many of the high values requiring insurance today[.]"⁹

Much of the reinsurance purchased by American insurers and reinsurers in fact comes from outside the United States: as of 1993, U.S. insurers ceded over \$13 billion in premiums to, and reported reinsurance recoverables of over \$39 billion from more than 2,000 non-U.S. reinsurers in over 90 jurisdictions. RAA, *The U.S. Reinsurance Market in 1993: An Analysis of Annual Statement Data 2-7* (1995). Reinsurers outside the United States account for approximately 40 percent of all reinsurance assumed from insurers in the United States, and only 27 of the 100 largest reinsurers in the world are American. *Id.* The Mission companies in fact had reinsurance agreements with companies "all over the world." Pet. Br. at 12 n.30.

As Congress and this Court have recognized, courts demonstrating a narrow or local perspective do not advance the commercial interests of the United States in international markets.¹⁰ The Dingell Report in fact recently concluded that state courts, in the context of insurance insolvencies, have limited control over non-U.S. parties-in-interest. Dingell Report at 63 ("international reinsurance . . . seems beyond the effective jurisdiction and capabilities of state insurance commissions").

⁹ Graydon S. Staring, *The Law of Reinsurance* 1:4 at 5; Bernard L. Webb, et al., 1 *Principles of Reinsurance* 16 (1st ed. 1990) ("reinsurance has always been an international business . . . because the purpose of reinsurance . . . is to spread large risks and catastrophes over as large a base as possible").

¹⁰ See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974) ("parochial" refusals by courts to enforce arbitration in international contracts would impair foreign commerce); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-425 (1964) ("rules of international law should not be left to divergent and perhaps parochial state [court] interpretations"); 9 U.S.C. §§ 201-208 (providing for federal court enforcement of international arbitration agreements).

B. The Commissioner's Claims Against Reinsurers Must Be Resolved Through The Application Of Legal Principles And Not Policy Judgments

An essential element of this Court's decision to abstain in *Burford* was the fact that the Texas regulatory scheme vested the Commissioner and the reviewing state court with "broad discretion" to weigh diverse policy interests concerning economic development and conservation in determining whether the issuance of drilling permits would further the public interest. 319 U.S. at 320, 323-327. Federal courts cannot fulfill that state policy-making function. As the California Supreme Court has definitively held, however, the Commissioner and the California courts do not have discretion to weigh public policy factors in adjudicating claims asserted against reinsurers in the aftermath of an insolvency.

In *Prudential Reinsurance Co. v. Superior Court*, 842 P.2d 48 (Cal. 1992), the Commissioner sought to prevent one of Mission's reinsurers from exercising a contractual right to set off monies due from Mission against amounts the reinsurer owed to Mission. The Commissioner contended that "considerations of public policy and equity should preclude reinsurers' rights to set off debts they claim to be owed by the Mission companies" because the sums available to distribute to policyholders would be greatly reduced if reinsurers could exercise their setoff rights. 842 P.2d at 61. The court nevertheless declined to defer to the Commissioner's interpretation because he was only authorized to act as the "liquidator with the same rights and obligations of the insolvent insurer pursuant to the terms of the reinsurance contract," *Id.* at 58, and the court's mandate was solely to interpret the terms of the contract and apply a "broadly phrased statute permitting setoff." *Id.* at 63. The court found that the "economic arguments" favoring a different outcome had to be "addressed to the Legislature" because "[w]e are unwilling to engage in complex economic regulations under the guise of judicial decisionmaking." *Id.* (quot-

ing *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1168, 278 Cal. Rptr. 614, 805 P.2d 873 (1991)).

The Commissioner and the California courts also have no discretion to weigh public policy in adjudicating the dispute at issue here. The threshold issue is in fact one of federal law—whether Allstate is entitled to enforce its contractual right to arbitrate under the FAA. The Commissioner's claims for monies against Allstate and other reinsurers depend upon the application of contract, tort, and statutory principles and industry custom and practice that are routinely applied by arbitrators as well as state, federal, and foreign courts. Those principles are certainly not within the unique competence of the liquidation court.

C. California Law Does Not Vest The Liquidation Court With Exclusive Jurisdiction Over The Commissioner's Actions Against Reinsurers

In *Burford*, this Court emphasized that the Texas Legislature had designated a single court responsible for the oversight of the Texas Railroad Commission's decisions evaluating the public interest in the issuance of oil drilling permits. Petitioner contends that California has done that here as well by giving the liquidation court exclusive jurisdiction to decide all controversies relating to the insolvent insurer. Pet. Br. at 31. The Commissioner clearly misunderstands the California scheme.

1. Under the California insolvency scheme, the court supervising an insurance liquidation proceeding has jurisdiction to hear all actions against the insolvent. Cal. Ins. Code § 1058 (1995). The central purpose of the powers conferred on the liquidation court, however, is to oversee the Commissioner's conduct of the liquidation process.¹¹

¹¹ See, e.g., Cal. Ins. Code § 1011 (1995) (upon application of Commissioner, order conservation of insurer); Cal. Ins. Code § 1035 (1995) (approve Commissioner's expenses to administer receivership); Cal. Ins. Code § 1037(d) (1995) (approve Commissioner's transactions involving insolvent's property valued at over \$20,000).

Nothing in § 1058 purports to grant the liquidation court with exclusive jurisdiction over all actions relating to the insolvent insurer. Instead, Petitioner relies upon Cal. Ins. Code § 1020 (1995), which authorizes the liquidation court to enjoin certain types of proceedings. Pet. Br. at 9 n.20.

Petitioner's reliance on § 1020 is misplaced. Section 1020 provides that the liquidation court "shall issue such other injunctions or orders as may be deemed necessary to prevent . . . the institution or prosecution of any actions or proceedings." In *Webster v. Superior Court*, 758 P.2d 596 (Cal. 1988), the Commissioner argued that this language should be interpreted to require the liquidation court to exercise exclusive jurisdiction over all claims against the insolvent insurer. *Id.* at 598-599. The California Supreme Court rejected that construction. Instead, the court held that Section 1020 merely "reflects a legislative intent to preserve an insolvent insurer's assets for orderly disposition by the Commissioner" and certainly should not displace adjudication—such as that in issue here—which does not seek recovery from the assets of the estate. 758 P.2d at 599. The *Webster* court determined that Section 1020 did not pose a bar to the plaintiff's maintenance of a personal injury action against the insolvent company outside the liquidation court because any recovery would be paid by the insolvent's insurers. The court accordingly found that adjudication of the claims against the insolvent would not pose any interference with the liquidation proceedings. *Id.* at 602-603, 605-607. In light of *Webster*, there is no conceivable basis to construe that section as requiring the Commissioner to initiate all actions to *augment* the assets of the estate in the liquidation court.

2. The liquidation court did not purport to enjoin the proceedings at issue in any event. Petitioner's contention that the court asserted "sole and exclusive jurisdiction" is not supported by the actual terms of the order. Pet. Br. at 18 n.19. The restraining order relied upon

by Petitioner merely enjoins persons from "instituting or prosecuting any action or proceedings *against* [the Commissioner]." Pet. App. at 120a (emphasis added). The action in this case, however, was initiated *by the Commissioner*—not "*against*" the Commissioner. Allstate's removal of the action to federal court in no way changes the fact that the Commissioner is the plaintiff, not the defendant. Nothing in the terms of the order accordingly required the Commissioner to file proceedings in the state liquidation court.

3. Although Petitioner contends that the purpose of California's insolvency law "cannot be meaningfully carried out if the various elements necessary to the process can be spread out over multiple jurisdictions," (Pet. Br. at 31), receivers of insolvent insurers have repeatedly invoked the jurisdiction of federal courts to resolve a broad range of claims. *See, e.g., Fidelity & Deposit v. Pink*, 302 U.S. 224 (1937) (state receiver sued reinsurer in federal court over reinsurance proceeds); *United States Dept. of Treasury v. Fabe*, 508 U.S. —, 113 S.Ct. 2202 (1993) (state receiver initiated declaratory judgment action in federal court).¹² Moreover, the California Insurance

¹² *See also Todd v. Deposit Guar. Nat'l Bank*, 849 F. Supp. 1149 (S.D. Miss. 1994) (receiver sued safekeeping agent in federal court to recover insolvent's assets); *Eakin v. Continental Illinois Bank & Trust*, 212 F.R.D. 363 (N.D. Ill. 1988) (receiver sued bank in federal court for funds due under letter of credit); *Long v. Alexander & Alexander Servs.*, 680 F. Supp. 746 (E.D.N.C. 1988) (receiver sued liability insurer in federal court for state and federal RICO violations); *Carroll v. Brown*, 1987 U.S. Dist. LEXIS 613 (N.D. Ill., Jan. 26, 1987) (receiver sued shareholders of insolvent insurer in federal court for state and federal securities law violations); *Morgan v. American Risk Management*, 1990 U.S. Dist. LEXIS 9037 (S.D.N.Y., July 20, 1990) (receiver sued reinsurers to collect proceeds under reinsurance contract); *Stamp v. Insurance Co. of North America*, 908 F.2d 1375 (7th Cir. 1990) (state receiver sued reinsurance pool in federal court over reinsurance proceeds); *Evans v. American Surplus Underwriters Corp.*, 739 F. Supp. 1526 (N.D. Ga. 1989) (receiver as subrogee sued insurer in federal court for personal injury and breach of con-

Commissioner has invoked the jurisdiction of federal courts to sue on behalf of insolvent insurers, including at least one action seeking to recover amounts allegedly owed by reinsurers of the insolvent—the precise claim asserted in the present action. *Roxani Gillespi, Ins. Comm. of California, as Liquidator of C-F Ins. Co. v. Waite-Hill Assurance, Ltd.*, Case No. 87-08504, RMT (KX) (C.D. Cal. 1987) (action for declaratory relief,

tract); *Bernstein v. Greater New York Mut. Ins. Co.*, 706 F. Supp. 287 (S.D.N.Y. 1989) (receiver as assignee of right to suit sued excess insurer in federal court for personal injuries); *Jump v. Manchester Data Sciences Corp.*, 424 F. Supp. 442 (E.D. Mo. 1976) (receiver sued data processing company in federal court for possession of insurance data); *Superintendent of Ins. of New York v. Bankers Life & Cas. Co.*, 300 F. Supp. 1083 (S.D.N.Y. 1969) (receiver sued shareholders in federal court for state and federal securities law violations); *Jump v. Goldenhersh*, 474 F. Supp. 1306 (E.D. Mo. 1979) (receiver sued insolvent's attorneys in federal court for money insolvent paid attorneys just before insolvency); *Superintendent of Ins. of New York v. Freedman*, 443 F. Supp. 628 (S.D.N.Y. 1978) (receiver sued company officers in federal court for state and federal securities law violations); *Jump v. Manchester Life & Cas. Management Corp.*, 438 F. Supp. 185 (E.D. Mo. 1977) (receiver sued management company in federal court for fraud); *Jump v. Pioneer Bank & Trust Co.*, 433 F. Supp. 38 (E.D. Mo. 1977) (receiver sued bank officers in federal court to force officers to recognize liquidator's right to vote stock owned by insolvent); *Smith v. Abbate*, 201 F. Supp. 105 (S.D.N.Y. 1961) (receiver sued policyholders in federal court over payment of assessments); *Combs v. Chambers*, 302 F. Supp. 194 (N.D. Okla. 1969) (receiver sued philanthropic foundation in federal court to enforce receiver's judgment against foundation); *Lyons v. Jefferson Bank & Trust*, 781 F. Supp. 1525 (D. Colo. 1992) (receiver sued bank in federal court over possession of assets); *Curiale v. Amberco Brokers Ltd.*, 766 F. Supp. 171 (S.D.N.Y. 1991) (receiver sued brokers in federal court for breach of reinsurance contract, receiver opposed brokers' motion to remand based on abstention); *O'Connor v. Insurance Co. of North America*, 622 F. Supp. 611 (N.D. Ill. 1985) (receiver sued reinsurers in federal court to collect reinsurance proceeds); *Keehn v. Excess Ins. Co. of America*, 129 F.2d 503 (7th Cir. 1942) (receiver sued reinsurer in federal court to collect reinsurance proceeds).

reformation, breach of contract, and other claims against a reinsurer of an insolvent insurer).

4. Other provisions of the California scheme further confirm that the legislature did not contemplate "a single, integrated proceeding to . . . adjudicate claims." Pet. Br. at 31. That scheme, for example, provides express authority for the prosecution of a variety of litigation in other jurisdictions.

First, the legislature clearly contemplated that the California Insurance Guaranty Association ("CIGA") would be involved in litigation outside the liquidation court. CIGA was formed for the purpose of assuming some of the insurer's obligations to policyholders in the event of insolvency. Thus, payment of some claims to policyholders is made directly by the liquidator, but others are made by CIGA and other state guaranty associations. Cal. Ins. Code § 1063.2 (1995). In the Mission insolvency alone, guaranty fund costs (i.e., the cost of covered policyholder claims) are estimated at \$458 million. A.M. Best, *Best's Insolvency Study supra* at 45-46 (June 1991).

The California Legislature has nevertheless given CIGA the same rights as the "insolvent insurer would have had if not in liquidation, including . . . the right to . . . appear, defend, and appeal a claim in a court of competent jurisdiction." Cal. Ins. Code § 1063.2(b)(1) (1995) (emphasis added).¹³ Because California, and every other State for that matter, created a guaranty fund to act as the insurer with regard to the processing and adjudication of policyholder claims, instead of the liquidator, it is plain that the California Legislature did not

¹³ The Guaranty Association takes the place of the insurer, processes and pays claims, and substitutes the insurer in ongoing litigation involving the policies wherever such litigation is pending. See Cal. Ins. Code § 1063.2(b) (1995). Because an insolvent insurer likely did business in all fifty states, the guaranty fund's responsibility likewise can extend to all the insolvent's literally thousands of policyholders and their claims in litigation in all fifty states.

contemplate a single, integrated insolvency proceeding as Petitioner asserts.

Second, when an insolvent California insurer has assets in another State, the liquidator may initiate an "ancillary" receivership proceeding in that other State to dispose of claims and assets there. Cal. Ins. Code § 1064 (1995). California's Uniform Liquidation Act provides that "non-domiciliary creditors may file and prove their claims before ancillary receivers . . . [and] the domiciliary receiver may sue in the reciprocal state to recover any assets of a delinquent insurer to which he or she may be entitled under the law." Cal. Ins. Code § 1064.1(f)(3) and (6) (1995). Further, where a nonresident of California files a claim in an ancillary receivership proceeding, and California is the situs of the domestic receivership, "the final allowance of such claim by the courts in the ancillary state shall be accepted in this state as conclusive as to its amount, and shall also be accepted as conclusive as to its priority." Cal. Ins. Code § 1064.4(b) (1995).

D. This Court And The California Supreme Court Have Rejected The View That *In Personam* Proceedings Impermissibly Interfere With The Conduct Of An Insolvency Proceeding

This Court has repeatedly held that the exercise of *in personam* jurisdiction over claims related to an *in rem* proceeding, such as the liquidation proceeding pending before the California receivership court, does not interfere with the state court's proceedings. See, e.g., *Morris v. Jones*, 329 U.S. 545, 549 (1947). There is no dispute that the underlying causes of action in this case are *in personam*. There is accordingly no basis to conclude that abstention is necessary to prevent disruption of the state proceedings in this case.

1. In *Morris*, this Court determined that principles of comity did not bar a state court from exercising jurisdiction over an *in personam* claim against an insurance company during the pendency of liquidation proceedings in

another state. This Court reasoned that "the establishment of the existence and amount of a claim against the debtor [in a non-liquidation court] in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have." 329 U.S. at 549.

These principles have consistently been applied in a variety of contexts.¹⁴ The California Supreme Court has in fact acknowledged the logic of this rule and upheld the right of a plaintiff to bring a personal injury action against an insolvent insurer outside the liquidation court. *Webster v. Superior Court*, 758 P.2d 596 (Cal. 1988).

2. In contrast, principles of comity have been construed to bar state and federal courts from exercising concurrent jurisdiction over *in rem* actions involving the same res. It is for this reason that federal courts have on occasion declined to exercise their *in rem* jurisdiction where the State had a strong interest in presiding over the *in rem* proceeding. See *Penn General Cas. Co. v. Pennsylvania*, 294 U.S. 189 (1935); *Pennsylvania v. Williams*, 294 U.S. 176 (1935). That rule, however, has no application

¹⁴ See, e.g., *Coit Independence Joint Venture v. Federal, Sav. & Loan Ins. Corp.*, 489 U.S. 561, 575 (1989) (rejecting FSLIC's argument that judicial adjudication of claims outside its administrative process would interfere with its liquidation powers, noting that "it was well established at common law" that suits determining that existence or amount of a claim did not interfere with a liquidation court's jurisdiction or the liquidation process); *Markham v. Allen*, 326 U.S. 490, 494 (1946) (rejecting the claim that adjudication of an *in personam* action in federal court against an estate would interfere with probate proceedings in state court because the *in personam* judgment did not cause any direct "interference with property in the possession or custody of a state court" despite the fact that the probate court would be bound to recognize the validity of the judgment entered by the federal court when distributing assets); *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613, 619-620 (1936) (no conflict between state and federal court jurisdiction in national bank liquidation action).

to this case because the district court was not requested to assert *in rem* jurisdiction. And this Court has confirmed that the rule in *Penn General* has no application to the exercise of jurisdiction over *in personam* claims such as that in issue.¹⁵

Petitioner's claim that *Pennsylvania v. Williams* and *Penn General* adopt a special abstention doctrine for state insolvency proceedings, Pet. Br. at 43-44, is accordingly misplaced. In fact, the potential for interference with the ongoing liquidation process is even more remote in this case than in decisions such as *Morris* because the claims at issue have not been asserted against the insolvent insurer and therefore have no potential to diminish the assets available for distribution. Cf. *Granfinanciera v. Norberg*, 492 U.S. 33 (1989)¹⁶; *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion)¹⁷.

¹⁵ See, e.g., *Markham v. Allen*, 326 U.S. at 490 (describing *Penn General* as a rule barring exercise of *in rem* jurisdiction over property in the custody of a state court); *Bradford*, 297 U.S. 613, 619-20 (rejecting the argument that the *Penn General* rule of comity should require dismissal of an *in personam* action).

¹⁶ The *Granfinanciera* Court held that a bankruptcy trustee's action against a party for fraudulent transfer of assets could not be tried before a bankruptcy judge without a jury, because such an action was not part of the *in rem* proceeding but "more nearly resemble[d] state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." 492 U.S. at 56.

¹⁷ Specifically, the plurality noted that the "right to recover contract damages to augment [an] estate" is a "private right" that is not created by the law of bankruptcy, and that the "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages." 458 U.S. at 71-72.

E. Abstention Undermines California Policy By Permitting The Commissioner To Unnecessarily Impair The Rights Of Reinsurers

Petitioner's contention that California policy is furthered by permitting the Commissioner to require the adjudication of its claims against reinsurers in the liquidation court is not supported by California precedent. In *Kinder v. Superior Court of Orange County*, 144 Cal. Rptr. 291 (Cal. Ct. App. 1978), the California Appellate Court determined that the legislature had not vested the Commissioner with powers to abrogate important procedural rights of litigants sued by the Commissioner to recover assets for the estate. That reasoning compels the conclusion that it is also not California policy to abrogate a reinsurer's right to remove actions to federal court.

In *Kinder*, the Commissioner sought to utilize an order to show cause in the liquidation court to recover sums allegedly due the insolvent insurer under the terms of an agency contract. The Commissioner maintained that the liquidation court could invoke the order to show cause against the defendant at the request of the Commissioner pursuant to the Commissioner's authority to prosecute "legal proceedings" under Cal. Ins. Code § 1058. The California Appellate Court disagreed. The court reasoned that the legislature would not have intended the liquidation court to use its "summary process to marshal assets of an insolvent estate" with respect to a claim "for an unliquidated and disputed debt alleged to be due under . . . the agency contracts," because that process "would deprive [the defendant] of important rights to which it would be entitled in an independent action." 144 Cal. Rptr. at 296. There is similarly no basis to conclude that it is the policy of the State of California to derogate a reinsurer's federal right to invoke federal diversity jurisdiction and to enforce its arbitration agreements.

As the California Supreme Court emphasized in the *Prudential Reinsurance* case, the Commissioner simply accedes to the rights of a private insurer when he initiates

in personam litigation against reinsurers to augment the assets of the estate. 842 P.2d 48, 54, 59 (Cal. 1992). The fairness of the adjudicative process should accordingly not be compromised at his request. The importance of preserving the procedural rights of litigants sued by the Commissioner was in fact recently underscored by the findings of the Dingell Report. The subcommittee emphasized that the Commissioner has not acted as an impartial public official in pursuing efforts to garner assets for the Mission estate. The Report explained that, "the receiver for Mission refused to acknowledge that the noxious management behavior at Mission observed by the subcommittee constituted fraud, as it might well have ruined his civil actions to recover \$2.2 billion from Mission's reinsurers if he had admitted that fraudulent behavior had occurred." Dingell Report at 62.¹⁸

II. ANY RULE GRANTING EXCLUSIVE JURISDICTION TO THE LIQUIDATION COURT TO ADJUDICATE CLAIMS AGAINST REINSURERS WOULD CONTRAVENE IMPORTANT FEDERAL INTERESTS

Even if California had an interest in preventing the assertion of federal jurisdiction in this case, that interest would not outweigh the substantial federal interests in providing a forum to diverse defendants and in promoting enforcement of the terms of the FAA.¹⁹

¹⁸ The Report further stated: "With no real incentive to discover management fraud, and with a strong financial reason not to find it, the receiver is not in a position to issue a credible determination regarding the existence of fraudulent activity by senior management admission, yet he is the only state official assigned to investigate the insolvency. Marshalling assets and pursuing wrongdoers are both important public functions when an insurance company fails and those two distinct tasks should not be combined in a manner that prevents one or the both of them from being faithfully performed." *Id.*

¹⁹ The importance of the availability of diversity jurisdiction is discussed in the amicus brief of the National Association of Independent Insurers, *et al.*

A. The Rule Advocated By Petitioner Is Inconsistent With The Federal Interest In Promoting Arbitration

Petitioner's argument is inconsistent with federal policy concerning arbitration in two respects. First, the logic of the rule Petitioner advocates—the need to grant the liquidating court sole and exclusive authority to adjudicate all claims against reinsurers—would necessarily preclude arbitration. Any such rule, however, is flatly inconsistent with the FAA. Second, Congress has vested federal courts with jurisdiction to enforce the FAA for the very purpose of guarding against judicial hostility to arbitration agreements. A rule of abstention would totally undermine that Congressional goal.

1. The adoption of Petitioner's rationale in this case cannot be reconciled with Congressional policy promoting the enforcement of contractual agreements to arbitrate. If what Petitioner claims is true—that California's statutory insolvency scheme requires the liquidation court to exercise exclusive jurisdiction to adjudicate claims against reinsurers—then arbitration could not occur in the context of any California insurance insolvency. Any such interpretation of California law, however, is preempted by the conflicting Congressional policy adopted in the FAA.²⁰

The FAA establishes that arbitration agreements "shall be valid, irrevocable, and enforceable" in accordance with rules applicable to other contracts, 9 U.S.C. § 2, and

²⁰ There is also no basis to interpret California law to bar enforcement of arbitration clauses in agreements with insolvent insurers. The California Insurance Code contains no such provision. In addition, California courts have confirmed that litigation brought by the Commissioner should proceed in the same manner as if it had been brought by the private insurer prior to insolvency. *See supra* at 21-22. If California law were interpreted to prohibit arbitration in these circumstances, it would necessarily be preempted by the FAA unless saved from preemption by the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1970). That issue, however, is one of federal law, and therefore provides no basis for abstention.

grants federal courts the power to enforce arbitration agreements by compelling arbitration, staying proceedings pending arbitration, and affirming arbitral awards, 9 U.S.C. §§ 3, 4, 9. The federal policy adopted in the FAA is in fact so compelling that this Court recently reaffirmed the conclusion that the FAA "pre-empts state law; and . . . state courts cannot apply state statutes that invalidate arbitration agreements." *Allied Bruce-Terminex Co. v. Dobson*, 513 U.S. —, 115 S.Ct. 834, 838 (1995) (citation omitted). As this Court further observed in *Allied Bruce*, the basic policy underlying the FAA is to "overcome court refusals to enforce agreements to arbitrate." *Id.* And Congress found that arbitration must be enforced even where enforcement leads to "piecemeal" adjudication of controversies. *Dean Witter Reynolds, Inc. v. Bird*, 470 U.S. 213, 221 (1985).

The need to vigorously enforce the FAA in fact has special importance to the reinsurance industry. As set forth, arbitration clauses have almost been "universally included in reinsurance contracts," R. Carter, *Reinsurance* 146 (1979), in an effort to reduce the costs, hostilities and delays engendered by litigation, and to permit resolution of controversies by experts familiar with industry custom and usage. *Prudential Lines v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983). In light of the number of insurance insolvencies that have occurred in recent years, and the magnitude of the claims asserted by insurance commissioners against reinsurers,²¹ the rule Petitioner advocates would seriously erode the cost saving function of arbitration.

Moreover, the international characteristics of the reinsurance industry further heighten the need to vigorously enforce reinsurers' contractual rights to arbitrate. This Court held in *Scherk v. Alberto-Culver Co.*, 417 U.S. at 516-17, that the "parochial refusal by the courts of one country to enforce an international arbitration agree-

²¹ See *supra* at 2, 15-16.

ment" would "surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." This Court further observed that Congress adopted Chapter 2 of the FAA, 9 U.S.C. §§ 201-208, for the very purpose of enforcing the terms of an international treaty requiring enforcement of international arbitration agreements. 417 U.S. at 420 n.15. This Court went on to explain that the delegates to the Convention on Recognition and Enforcement of Foreign Arbitral Awards "voiced frequent concern that courts of signatory countries . . . should not be permitted to decline enforcement . . . in a manner that would diminish the mutually binding nature of the agreements." *Id.*

2. Abstention in the context of this case directly undermines Congressional policy because Congress vested federal courts with jurisdiction to enforce arbitration agreements in part to guard against judicial hostility to such arrangements. Moreover, Congress established federal question jurisdiction and expansive rights to remove state court actions relating to foreign arbitration agreements. See 9 U.S.C. §§ 203, 205.²² As set forth, the insolvent insurer in this case had entered into such agreements with numerous foreign reinsurers and the prevalence of foreign reinsurance supports the conclusion that such agreements will be at issue in most insurer insolvencies.

There is accordingly little justification to give credence to the Commissioner's view that his claims against reinsurers must be adjudicated in the liquidation court when Congress has clearly foreclosed that option with respect to agreements with foreign reinsurers (when the contract requires arbitration). Moreover, Petitioner concedes that

²² Section 203 creates federal question jurisdiction without regard to the amount in controversy and Section 205 grants defendants a right to remove state court actions "any time before trial" where the subject of the proceeding in state court "relates to an arbitration agreement or award" encompassed within the Convention on Recognition and Enforcement of Foreign Arbitral Awards.

the threshold issue in this case is one controlled by federal law: whether Allstate's arbitration agreements are enforceable. Requiring abstention under these circumstances turns principles of comity on their head.²³

B. The McCarran-Ferguson Act Does Not Support Abstention In This Case

Petitioner contends that the policy underlying the McCarran-Ferguson Act reflects Congressional support for a rule of abstention in cases relating to state insurance liquidation proceedings. Pet. Br. at 46. Petitioner does not suggest that the Act, by its terms, would permit a State to override a Congressional grant of jurisdiction. In any event, neither the language nor the policy of McCarran-Ferguson would provide any support for such an interpretation.

McCarran-Ferguson provides that acts of Congress shall not be construed to "invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance." 15 U.S.C. § 1012. Any construction of McCarran-Ferguson to override principles of federal jurisdiction would mean that California could adopt a law barring all insurers from suing each other in federal court, and all federal statutes granting federal jurisdiction would be unavailable to insurers absent an express provision by Congress to the contrary. That construction is untenable for two reasons.

First, a state court's determination of an insurer's right of access to federal courts relates to jurisdiction, and not to the regulation of the "business of insurance." *Id.* at § 1012(b). This Court recently explained in *Hartford Fire Insurance Co. v. California*, 113 S.Ct. 2891 (1993), that the "business of insurance" refers to "mercantile transactions" that have the "effect of transferring or spreading

²³ See *New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. at 362 (1989) (federal court should not abstain from deciding a preemption challenge to a state regulatory scheme).

a policyholder's risk"; constitute an "integral part of the policy relationship"; and are limited to entities "within the insurance industry." *Id.* at 2901. A litigant's practice of invoking federal jurisdiction when established by Congress in no sense satisfies these criteria. Perhaps of greatest importance, the choice of jurisdiction does not in any way affect the allocation of risk established by contract or state law.²⁴

This Court has in fact held that practices related to claims adjudication which were far more "mercantile" in character were not part of the "business of insurance."²⁵

²⁴ See *United States Dept. of Treasury v. Fabe*, 508 U.S. —, 113 S.Ct. 2202, 2209-10 (1993) (holding that an Ohio insurance insolvency law that granted priority to policyholders and administrative expenses was part of the "business of insurance" because "there [would be] no risk transfer at all" if the terms of the policy were not performed due to insolvency). *Fabe* cannot be read to permit States to exclude federal jurisdiction as a means of ensuring performance of insurance policies. This Court emphasized that McCarran-Ferguson should not be read to displace federal law where the purposes of the federal law are "perfectly compatible" with the state's interest in protecting policyholders. 113 S.Ct. at 2208 (quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 463 (1969)). In *Fabe*, there was a "direct conflict" between the state's interest in ensuring that policyholders are paid and the federal government's interest in receiving payment. *Id.* The state's interest in securing performance of insurance policies is not, however, in "direct conflict" or "incompatible" with the assertion of federal jurisdiction to resolve disputes. *Id.*

²⁵ In *United Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), an insurer utilized a peer review committee to determine whether policyholder claims for chiropractor services were covered by their policies. The insurer's right to use this process was established by the terms of the policy. This Court nevertheless found that the claims review process was not an integral part of the policy relationship, and that it was not a term that served to spread and underwrite the policyholder's risk. *Pireno* emphasized that the "challenged peer review arrangement is logically and temporally unconnected to the transfer of risk accomplished by [Petitioner's] insurance policies." *Id.* at 130. Determining the availability of federal jurisdiction is even further removed from the business of insurance than the peer review process at issue in *Pireno*.

Second, States simply have no constitutional power to adopt rules or statutes that bar individuals from gaining access to federal courts. *See, e.g., General Atomic Co. v. Felter*, 434 U.S. 12, 16 (1977) (finding that "state courts are *completely without power*" to restrain individuals from seeking access to federal court) (emphasis added); *Donovan v. Dallas*, 377 U.S. 408, 413 (1964). Congress did not delegate power to the States to exercise authority that they otherwise lacked. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 n.8 (1985) (holding that McCarran-Ferguson did not permit States to regulate the business of insurance in a manner that violated the equal protection clause because Congress "did not intend . . . to give the states any power . . . other than what they had previously possessed"). There is accordingly no basis to infer that Congress sought to empower States to impair litigants' fundamental rights of access to federal courts pursuant to the terms of generally applicable jurisdictional statutes.²⁶

²⁶ *See Grimes v. Crown Life Ins. Co.*, 867 F.2d 699, 702 (10th Cir. 1988), *cert. den'd*, 489 U.S. 1096 (1989) (McCarran-Ferguson does not alter the scope of diversity jurisdiction); *Stamp v. Insurance Co. of North America*, 908 F.2d 1375, 1379 (7th Cir. 1989) (States may not "obliterate the diversity jurisdiction of a district court" by claiming exclusive jurisdiction over the business of insurance).

CONCLUSION

For the reasons set forth herein, amici request this Court to affirm the decision of the Ninth Circuit.

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